Madras High Court Reports.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF MADRAS

IN

1871—1874.

BY

J. M. C. MILLS,

BARRISTER-AT-LAW.

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ADDENDA.

Page 11, note (a).—Add the words "*Venkata Reddi* v. *Párváti Ammál.*

,, 58.—To *Criminal Regular Appeal No.* 361 *of* 1871, add the following note;—

"This case was followed by Innes and Kindersley, J. J. in *Criminal Petition No.* 410 *of* 1872 (19th February 1873) the proceedings in the Lower Courts being under Act XXV of 1861. In *Reg.* v. *Parsharám Késháv*, 7 Bom. H. C. Rep., (Cr.C.) 61, (28th July 1870), it was held that this Section 167 requires that sanction should be given before prosecution, and, that without such sanction the Court has no jurisdiction, and in *Reg.* v. *Vináyak Divákat*, 8 Bom. H. C. Rep., (Cr. C.) 32, (14th June 1871), it was held that the Local Government has the power to limit its sanction, by giving directions as to the person by whom, and the manner in which, the prosecution is to be preferred and conducted, and a Court has no jurisdiction to entertain a charge against such public servant, if preferred otherwise than in accordance with such directions. The present Code of Criminal Procedure (Act X of 1872) which came into force on the 1st September 1872, appears to incorporate the Bombay decisions, for in Section 466, which is, in other respects, substantially the same as Section 167 of Act XXV of 1861, the following clauses are added :—" The sanction must be given before the commencement of the proceedings. The Local Government may limit the person by whom, and the manner in which, the prosecution is to be conducted, and may specify the Court before which the trial is to be held." This last clause is omitted in Act X of 1875, S. 131, which deals only with the High Courts.

Page 85.—*Chedambaram Chetti* v. *Ranga Kristna Muttuvára Puchaya Naiker, Zemindar of Marangapúri*, was affirmed by the Privy Council on Appeal. See L.R., 1 Indian Appeals, p. 241 ; S. C. 13 B. L. R., (P. C.) 509.

,, 143, lines 14 and 15.—To "Tindal, C. J., 7 Bing. 378," add "*Stanley* v. *Jones* ;" and to "Eldon, C. 18 Ves: 129," add *Wood* v. *Downes*."

,, 144, line 6.—To "4 Ben. L. R." add "(O. C. J.)."

,, 195, line 10.—To "28 L. J. Exch: 197," add "4 H. and N. p. 1;" and to "25 L. J. C. P. 91," add "17 C. B., p. 625;"

,, ,, line 11.—To "31 L. J. C. P. 100," add "11 C. B. (N. S.), p. 369."

,, 198, line 3 from the bottom.—To *Harris* v. *Rickett* add "27 L. J. (Ex.) 197 : 4 H: N:, p. 1."

,, 215, line 5 from the bottom.—Before the words "Decisions of 1862, p. 30," add *Chettur Damodaran Embrandiri* v. *Káyipranan Kellunu*;
and before the next line add *Chemmanthatti Chapunni Naiyar* v. *Meyene Itiachi*;
in the last line but one, to "1 M. H. C. R., 262" add *Addukanda Varriyár* v. *Rámen Nambúdri* ;
and to the last line add *Rágunada Naicken*, and another v. *Chinnappa Chetty* alias *Subramania Chetty*, and others.

,, 225, As a note to *Referred Case, No.* II *of* 1873 add "so held in, In the matter of the Petition of *Tadir Hossein Khondkar*, 6 B. L. R., 388.

,, 265, line 28.—To "(2, M. H. C. R.)," add "p. 143 *et seq.*"

,, 266, line 5.—To "M. H. C. R," add "p. 144."

,, 277, line 20.—To *Brooks* v. *Mitchell*, add "9 M. & W., p. 15 ;" and to *Barrough* v. *White*, add "4 B. & C., 325.

,, 280, line 26.—To "4 B. & C.," add "p. 325."

,, ,, last line.—To *Cripps* v. *Davis* (see Corrigenda), add "12 M. & W., 159."

,, 281, line 9.—To "*Bartrum* v. *Caddy*, 9 A. & E., 275 (see Corrigenda), add "(at page 278)."

,, 287, line 8.—To *Mayor of Lyons* v. *E. I. Co.*, 1 Moore's P. C.," add "p. 175."

,, 324, line 27.—To (3 *Madras High Court* 13), add *Syed Ali Saib* v. *The Zemindar of Salur.*

Page 332, line 19.—Between the words "see" and "*post*" insert *Venkatasamy Naick* v. *Setaputi Ambalam*, and, after the word "page" add "359."

Add the following note :—

In *Referred Case, No.* 21 *of* 1873, (Small Cause Suit, No. 368 of 1872,) the plaintiff, Mutukarupa Pillai, sought to recover Rs. 12-13-9, arrears of rent of land taken from him by the defendant, Rama Reddi, in 1870, under Ryotwar settlements. and on a verbal contract to pay rent. The defendant admitted that the land was one under Ryotwar settlement, but pleaded that the plaintiff could not sue in the absence of a written agreement under Section 13 of the Rent Recovery Act (Madras Act VIII of 1865). The District Munsif of Kulutulai in referring the question "whether the plaintiff's claim is not maintainable in the absence of any such lease or agreement in writing as is prescribed by Section 13 of the Act," remarked :—"It appears to me that the plaintiff comes within the second of the two interpretations of "landholders" in Section 1 of the said Act, and that Section 13 would only prevent him from exercising the authority vested in him by Section 2, in the absence of a written agreement, and not from suing his tenant in the Civil Court which is allowed by Section 87 of the said Act." On the 15th May 1874, the High Court, (Morgan, C. J., Holloway and Kindersley, J. J.) held that the Munsif was right in his opinion, and that the plaintiff was not one of the persons within Section 3 of the Act.

Page 363, note (*a*).—Substitute for the words "not reported," the following note :—

Referred Case No. 7 *of* 1874.

The plaintiff sought to recover Rs. 185-4-0 principal and interest, on an unstamped Promissory Note for Rs. 150, bearing date the 5th November 1871, and payable on the 10th April 1873. The Judge of the Court of Small Causes, Tripaty, referred the question "Whether the plaint can be admitted on payment of the penalty under Section 20, Act XVIII of 1869." On the 23rd February 1874, the High Court (Morgan, C. J., and Holloway, J.) *Held*, that the plaint could not be admitted. "There are two exceptions to the inability to stamp subsequently. This is within neither of them."

Page 368, line 20.—To *Taylor* v. *Hilary* (see Corrigenda) add "1 C. M. and R., 741."

" 371, line 27.—To "*Hogg* v. *Snaith*, 1 Taunt." add "p. 347."

" 390, line 10.—To "(3 H. C. 188)," add *Aroonachella Pillai* v. *Appávu Pillai*.

" 391, line 28.—To "(VI M. H. C. 137)," add *Moparti Pitchi Naidu* v. *Vuppala Kondamma*.

CORRIGENDA.

Page 179, last line but one.—For *Subbu Hegade*, read *Subbu Hegadi*.
„ 233, line 12.—For "fn" read "in."
„ 242, line 24.—For "theu" read "them."
„ 250, line 18.—For "Snit" read "Suit."
„ „ line 31.—For "Conrt" read "Court."
„ 257, line 10 from the bottom.—For "upou" read "upon."
„ 266, lines 4 and 5.—For "III, M. H. C. R," read "2 M. H. C. Rep. p. 144."
„ 280, line 12.—For *Cullingridge*, read *Collengridge*.
„ „ 13.—For *Sturtovant*, read *Sturtevant*.
„ „ last line but one.—For *Croffs* v. *Davis*, read *Cripps* v. *Davis*, 12 M. & W., 159.
„ 281, line 9.—For *Brockman* v. *Caddy*, 4 A. & E., read *Bartrum* v. *Caddy*, 9 A. & E.
„ 285, line 9.—For "grouud," read "ground."
„ 286, line 14.—For *Dela*, read *De la*.
„ 287, line 15.—Strike out "C. Qy.," after "1 Moore's I. A."
„ „ 24.—For "p. 271-2," read "p. 273."
„ 288, line 8.—For "reverced," read "reversed."
„ „ 19.—For "repeel" read "repeal."
„ 290, line 21.—For "soundnesss" read "soundness."
„ 312, line 5, from the bottom.—For "deseribed," read "described."
„ „ „ strike out the last paragraph of the *Note* to *R. A.* 131 *of* 1872, from line 20 to line 23.
„ 340, line 34.—For "veseel," read "vessel."
„ 351, line 10.—For "declained" read "declared."
„ 356, note (*a*).—For "Mor an," read "Morgan."
„ 368, line 20.—For *Taylor* v. *Henry*, read *Taylor* v. *Hilary*, 1 C. M. & R., 741.
„ 371, line 30.—For *Edmonds* v. *Bushell*, read *Edmunds* v. *Bushell*.
„ 397, line 14.—For "whetber," read "whether."

The page preceding page 389, has been misprinted 888 for 388.

(6)

CORRIGENDA.

Page 1, last line of the head-note, *instead of* ' its reception not being precluded by the provisions' *read* ' it not being a document coming within the operation of Section 17.'

,, 16, line 3, *for* ' defendant's' *read* ' defendants'.'

,, 27, line 1, *dele* the comma after ' question.'

,, 32, line 12 from bottom, *for* ' office' *read* ' offices.'

,, 42, line 26, *for* ' plaintiff's' *read* ' plaintiffs'.'

MADRAS HIGH COURT REPORTS.

Appellate Jurisdiction. (a)

Referred Case No. 14 of 1870.

VENKATARA'MA NAIK and another,

against

CHINNATHAMBU REDDI.

The plaintiff hypothecated certain land to the defendant by a duly registered instrument, and subsequently paid off the debt and received back the instrument. At the time of payment the defendant made an endorsement on the bond to the following effect—"25th Kartiké of Sukla. Rupees two hundred and sixty-three, principal including interest, was received on account of this bond, and there is, therefore, no lien whatever." Some time afterwards plaintiff discovered that what he had paid in redemption of the mortgage claim was in excess of what was due, and he brought a Small Cause suit to recover the amount overpaid, tendering in evidence the endorsement on the bond. The objection was taken that the endorsement not being registered was not receivable in evidence, under Section 49 of the Registration Act of 1866. The District Munsif dismissed the suit upon the ground that the endorsement was not signed by the defendant and was, therefore, not admissible in evidence, but referred to the High Court the question whether the evidence was rightly excluded.

Held, by SCOTLAND, C. J. and INNES, J., that the fact of there being no signature to the endorsement was no objection to its reception as confirmatory evidence of the sum received by the defendant.

By SCOTLAND, C. J.—That the endorsement was admissible evidence for the purpose for which it was offered, although not registered, the endorsement not being used as evidence of the creation or discharge of an obligation, but merely as confirmatory proof of a fact provable by oral evidence although stated in writing.

By INNES, J.—That the endorsement was admissible evidence, its reception not being precluded by the provisions of the Registration Act.

1871. *November* 10. *R. C. No.* 14 *of* 1870.

THE following case was stated under Section 22, Act XI of 1865, by T. Appiah Chettiar, District Munsif of Cuddalore, in Suit No. 1102 of 1869.

"The plaintiffs sue the defendant for the recovery of Rupees 10-10-0, said to have been overpaid to the defendant.

The plaint sets forth that the plaintiffs and 1st plaintiff's wife Venghi, and his son Chinnaya Naik (who are under the maintenance of plaintiffs) mortgaged their 5½ kánis of land to defendant on the 9th Tai of Atchaya (20th January 1867) for Rupees 186-10-0: that on the 25th Kartiké of

(a) Present :—Scotland, C. J. and Innes, J.

1871. November 10. R. C. No. 14 of 1870.

Sukla (8th December 1869) the plaintiffs asked defendant to receive the principal and interest and to return the bond, when the defendant told them that the principal and interest due on the bond amounted to Rupees 263, which sum the plaintiffs paid to the defendant, and he endorsed its receipt on the back of the bond and returned it to plaintiffs: that the plaintiffs, not knowing how to read and write, referred to men who could read, when they found that the defendant received from them Rupees 10-10-0 more than was actually due; which sum the plaintiffs claim to recover from the defendant.

The defendant denies having received the Rupees 10-10-0, and states that on the day previous to the 25th Kartiké (8th December 1869) the plaintiffs asked him what amount was due on the bond, in reply to which he wrote on a piece of cadjan that the amount due to him under the bond was Rupees 252-3-0: that on the 25th Kartiké aforesaid the plaintiffs paid him only Rupees 252, and said that they had not brought the 3 annas: that the defendant received the Rupees 252 and simply returned the bond to plaintiffs, without endorsing the receipt of the money on the back of the bond as alleged by plaintiffs: and the defendant states that the endorsement is not his handwriting.

The mortgage bond in question was regularly registered under the Indian Registration Act XX of 1866, and by its terms 5½ kánis of land were mortgaged to the defendant for Rupees 187-10-0.

The following is the translation of the endorsement on the back of the bond—"25th Kartiké of Sukla, Rupees two "hundred and sixty-three, principal including interest, was "received on account of this bond, and there is therefore no "mortgage lien whatever." This endorsement is not signed by the defendant but is attested by four persons.

The defendant's Vakíl pleads that the original document, which purports to be a mortgage of immovable property, has been duly registered, and that, therefore, the endorsement discharging that liability must also be registered under Clause 3, Section 17 of the Act, but that it is not registered and,

under Section 49, cannot be received in evidence......... and the last objection is that the document not being signed by the defendant, it cannot be received in evidence............ As the endorsement is not signed by the defendant, I am of opinion that it cannot be received in evidence. I have dismissed the suit, subject, however, to the orders of the Honorable Court as to the correctness of my views."

1871. *November* 10. *R. C. No.* 14 *of* 1870.

No counsel were instructed.

The Court delivered the following judgments :—

SCOTLAND, C. J.—I am of opinion that the endorsement was admissible evidence for the purpose for which it was offered, although not registered.

The parties were not, it appears, at issue as to the discharge of the defendant's mortgage lien. The sole question between them was whether Rupees 263, or the smaller sum really due on the bond, was received by the defendant on the 8th December 1869; and the endorsement, therefore, was put forward simply as confirmatory evidence of the defendant's receipt of the former sum on account of the bond, a fact provable by oral evidence although stated in the endorsement.

Then, as to there being no signature to the endorsement. That was, clearly, no objection to its reception as confirmatory evidence of the sum received by the defendant. I think the present case may be distinguished from the case of *Achoo Bayamah* v. *Dhany Ram and another* (IV M. H. C. Rep. 378) on the ground that it is not sought to use the endorsement as evidence of the creation or discharge of an obligation, but merely as confirmatory proof of a fact provable by oral evidence although stated in writing.

INNES, J.—In the case referred to us, the plaintiff had hypothecated certain land to the defendant by a duly registered instrument, and subsequently paid off the debt and received back the instrument. At the time of payment the defendant made an endorsement on the bond to the following effect :—"25th Kartiké of Sukla. Rupees two hundred and sixty-three, principal including interest, was received on account of this bond, and there is therefore no lien whatever."

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Some time afterwards plaintiff discovered that what he had paid in redemption of the mortgage claim was in excess of what was due, and he brought a Small Cause Suit to recover the amount overpaid, tendering in evidence the endorsement on the bond. The objection was taken that the endorsement required registration, and, not being registered, was irreceivable in evidence under Section 49 of the Registration Act of 1866.

The District Munsif dismissed the suit upon the ground that the endorsement was not signed by the defendant and was, therefore, not admissible in evidence, but referred to the High Court the question whether the evidence was rightly excluded.

The ground upon which the District Munsif excluded the evidence is clearly untenable, but there remains the question upon which the Chief Justice and Mr. Justice Holloway differ, as to whether Section 49 of the Registration Act precludes the admission of the endorsement as evidence for the purpose for which it is tendered, viz., to prove the amount paid.

In the case at IV M. H. C. Rep. 378, in which I took part, the majority of the Court came to the opinion that an instrument requiring registration by Section 17 of the Registration Act, if unregistered, is by Section 49 inadmissible in evidence *for any purpose whatever,* and the sole question now open for our consideration seems to me to be whether the endorsement is such an instrument as under Section 17 *requires* registration. Now, what does the endorsement amount to? Is it in the words of Clause 3, Section 17 "an "instrument which acknowledges the receipt or payment of "a consideration on account of the creation, declaration, "assignment, limitation, or extinction of any such right, title "or interest," *i. e.* of a right, title, or interest in immovable property of a value of one hundred Rupees and upwards.

The instrument is, as it seems to me, nothing more than an acknowledgment of the payment of a debt and of the fact of certain legal incidents attaching by the act of pay-

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ment, which does not operate as a consideration for anything to be done by the person receiving it. No act on the part of the defendant, the person receiving payment, was necessary to replace the plaintiff in possession of the entire interest in the property charged with the debt, for to the act of payment itself the law immediately attaches the incident of extinction of the hypothecation lien.

The clause appears to me to apply to instruments of acknowledgment of payment made on account of some such act of the party receiving payment, as is necessary to effect the change desired in the rights of the respective parties; as an instrument acknowledging repayment of the amount due on a mortgage in which the legal estate having been conveyed a reconveyance has become necessary; or an instrument acknowledging the payment of a sum of money on account of the extinction of a right of easement, in which some act of the party receiving the money is necessary to effect the extinction of the right residing in him. When no act of the party receiving the payment is necessary to effect the change of rights aimed at, the payment, I conceive, does not properly come within the term "consideration." I think, therefore, that the endorsement in the present case does not come within this clause of Section 17. Nor does it seem to come within any other clause of that Section. I am of opinion, therefore, that this case is not governed by the decision in IV M. H. C. Rep. 378, but I am unable to agree in the *reasons* of his Lordship the Chief Justice for the concurrent conclusion at which I have arrived, that the Registration Act does not shut out the reception of the document in evidence,

Appellate Jurisdiction. (a)

Regular Appeal No. 48 *of* 1871.

SRI' RA'JAH LAKSHMI CHELLIAH GA'RU, legal representative of SRI' RA'JAH SI'TARA'MA KRISHNA RA'YADAPPAH RANGA RAU BA'HA'DU'R GA'RU, ZAMINDA'R of BOBBILI.................................. *Appellant.*

SRI' RA'JAH SRI' KRISHNA BHUPATI DE'VU MA'HARAZ GA'RU, ZAMINDA'R of MADUGULA.................................. *Respondent.*

Plaintiff executed to defendant a document of which the following is a translation.—"The *Muddata Kriyam* executed on the 10th April 1835 " by the Madugula Zamindár to the Zamindár of Bobbili. As I have " conveyed to you as sale for Rupees 6,000 the Papuchetti Seri ad- " joining the land of Kasbah Jaggananthapuram in the Zamindári of " Madugula, they are given you for absolute sale : so the said sale money " has been received at the time of sale. In the event of my paying you " the principal rupees 6,000 within six months from this date, you must " give back the said land Papuchetti Seri to me. In the event of our " not being able to pay according to the said stipulation, you should " hereditarily from son to grandson enjoy the produce of the said land, " yourself paying to Government the assessment fixed on a sub-division, " reckoning this sale money to be a pure sale. This *Muddatu Kriyam* " has been executed with my consent." *Held*, that this document was a sale with a condition for re-purchase.

The decisions of the late Sadr Court of Madras have carried the doctrine of relief after the time named in the conveyance so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule and have held the question one of construction, admitting however, for the purposes of the construction, other documents and oral evidence.

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THIS was a Regular Appeal against the decision of F. C. Carr, the Acting Civil Judge of Vizagapatam, in Original Suit No. 56 of 1865.

The suit was brought to recover possession of a málguzári land called Pappuchetti Seri, yielding annually Rupees 977-0-8, and its mesne profits Rupees 7,963-6-10.

It was alleged in the plaint that the plaintiff, having contracted a debt of Rupees 6,000 with the defendant's father, on the security of Papuchetti Seri land situated in the plaintiff's Zamindárí of Madugula, on 10th April 1835 executed a conditional sale-deed in favor of the latter, with the proviso that if the sum of Rupees 6,000 should be repaid within six months the land should revert to the plaintiff:

(a) Present ;—Holloway and Innes, J J.

that the land had been in the possession of the defendant's father in liquidation of the debt ever since, the plaintiff paying the revenue. That the principal sum of Rupees 6,000 was liquidated by the 29th November 1856: that subsequently the rent of the land under dispute for three Faslis, 1271-72 and 73, corresponding with 1861, 62 and 63, amounting to Rupees 2,361, (which the defendant had realized in excess of the debt) was paid to plaintiff by the defendant's clerk: that the defendant's father died in 1862 without settling the transaction, and defendant also refused to do so.

The plaintiff, therefore, prayed for a decree for the possession of the land in question, together with the mesne profits realized by defendant in excess of his debt, and subsequent profits and costs and interest thereon at 1 per cent. per mensem, making the defendant and his estate answerable to the plaintiff's claim.

The defendant, in his written statement, relied upon the stipulation in the deed, and contended that as the plaintiff did not repay the Rupees 6,000 within the time fixed, the sale became an absolute one.

He denied that the rent for Faslis 1271, 1272 and 1273 had been paid to the plaintiff and asserted that the land did not realize the rent stated by the plaintiff.

The following issues were settled:

1. Whether the rents or mesne profits of Faslis 1271, 1272 and 1273, or of any and which of those Faslis were paid over by the defendant to the plaintiff?

2. Whether the document Exhibit I is to be regarded as a deed of conditional sale, under which the sale has now become absolute, or as a deed of mortgage by way of securing the sum advanced, and the plaintiff is consequently now entitled to sue to redeem the lands specified therein?

3. If the document is to be regarded as a deed of mortgage, then what sum, if any, is now due from defendant to the plaintiff on account of surplus mesne profits received?

The Civil Judge (J. G. Thompson) by whom the case was first heard, found upon the second issue that " the plaintiff

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did deliberately sell the land with a condition for re-purchase at a particular time, and it is admitted that at that particular time he failed to re-purchase, so that there is now no equity to relieve against the sale." He accordingly decided that the sale had become absolute, and dismissed the plaintiff's suit.

Upon appeal to the High Court, this decision was reversed, and the case remanded for re-trial; "Since the decision whether the transaction was to be regarded as a mortgage, or a sale, depended upon the original intention of the parties, which intention was to be ascertained, not by a perusal of the document only, but by a consideration of all the circumstances of the case."

The case was accordingly re-heard, and the Civil Judge (F. C. Carr) delivered a judgment from which the following is taken:—

"The plaintiff has examined 10 witnesses and filed documents marked A to S. His statement of the case, as supported by this testimony, is that the transaction referred to was intended by the parties themselves at the time to be only a mortgage; that they treated it afterwards as a mortgage, and never as an absolute sale; that the document itself shows it to have been a mortgage, and although there was in the document a stipulation for an absolute sale in case of failure to pay within six months, such stipulation must be considered in the light of a penalty which could not be enforced; and that, even though that time elapsed without such payment being made, the plaintiff was nevertheless entitled to redeem. Further, it was argued that by the terms of Regulation XXV of 1802, Section 8, no sale of a part of the plaintiff's zamindárí could be held valid unless it were registered by the Collector, and there is no pretension on the part of the defendant that such registration was ever attempted.

The document is dated on the 10th April 1835, and it is proved by the witnesses that at that time the plaintiff's zamindárí of Madugula was under attachment, and that in order to relieve it from attachment, and to meet his necessities, the plaintiff, the Zamindár of Madugula, applied to

the Zamindár of Bobbili for a loan of Rupees 40,000. Five villages of the Madugula estate were then sold to the Zamindár of Bobbili. The sum was deposited in the treasury, and the sale completed with all due formalities: the sale deed was produced by the Record keeper of the Collector's kachahrí, who also brought the book called the Register of Estates, in which is the following entry:—" This is to certify that the villages Kasbah Jagganáthapúram, and Dandi Suravaram have been transferred by private sale to Sivata Chellapatti Ranga Rau, Zamindár of Bobbili, by Krishna Bhupati, Zamindár of Madugula, and registered this 23rd July 1836 by sanction of the Board of Revenue under date the 30th June 1836."

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Signed " A. Freese—Collector."

This indisputably established the fact that at the time when this bond for Rupees 6,000 was executed, certain villages were actually sold by the plaintiff... ....

It remains to consider the terms of the document itself, the translation of which is as follows:—

" The '*Muddata kriyam*' executed on the 10th April 1835 by the Madugula Zamindár to the Zamindár of Bobbili."

" As I have conveyed to you as sale for Rupees 6,000 " the Papuchetti Seri adjoining the land of Kasbah Jagga- " náthapúram in the zamindárí of Madugula, they are given " you for absolute sale: so the said sale money has been " received at the time of sale. In the event of my paying " you the principal Rupees 6,000 within six months from " this date, you must give back the said land Papuchetti " Seri to me. In the event of our not being able to pay " according to the said stipulation, you should hereditarily " from son to grandson enjoy the produce of the said land " yourself paying to Government the assessment fixed on a " sub-division, reckoning this sale money to be a pure sale. " This '*Muddata kriyam*' has been executed with my con- " sent."

The word " *Muddata kriyam*" is thus translated by Professor Wilson, in his Glossary of Indian terms.—" Land mortgaged with option to the lendee to consider it as his

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property if the mortgage is not redeemed within a stipulated period."

It will thus be seen by the name of the document itself, and by the terms of the same, that it was not intended by the plaintiff at the time to make this an *absolute* sale. Where the intention is to convey property by a deed of sale the word "kriyam" would invariably be simply used before the word deed, and not "Muddata kriyam."

Then, again, it is clear from the evidence produced, both oral and documentary, that about the very same time this "Muddata kriyam" deed was executed, the plaintiff had given certain of his villages by absolute sale to the Zamindár of Bobbili. These latter were given with all due formality, the sale was regularly registered, the document given was an ordinary deed of sale, and these villages were sub-divided by the Revenue authorities from the estate of Madugula and added to the estate of Bobbili. If, therefore, it had been the intention of the parties to this contract to have it also considered as an absolute sale, there can be no doubt that they would in this case also have followed the same course, and gone through the same formalities: and as they did not, but on the contrary made a differently headed and worded document, and did not register the sale, it may be concluded that in this instance they both regarded it in the light of a mortgage.

The next question which arises is whether, granting that the transaction was to be regarded *at first* as a mortgage, after the lapse of the six months therein specified without the re-payment of the money, the document could be considered as having (as its terms imply) the full force of a sale deed. This is virtually already settled by the High Court in their appeal judgment, where they say that the question whether the transaction was to be regarded as a mortgage, or sale, depended upon the *original* intention of the parties, and not upon the words of their written contract. Therefore, as we have seen that the intention of the parties at the time was that of a mortgage, we must consider the force of the mortgage to obtain even now, although the stipulated period has long been exceeded.

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Further, as was pointed out by the pleader for the plaintiff, the recent rulings of the Court have been, in cases of this nature, to the effect that although there be in the written bond a strict provision that, in failure of payment after a stipulated period, the mortgagee shall be put in exclusive possession and enjoyment of the property, and the transaction be considered from that time an absolute sale, still "the mortgagor may in equity and good conscience redeem the property by paying off the debt, though the stipulated time for payment has been allowed to pass by."(*a*) Under this view of the case, the proviso making this document an absolute sale will be a dead letter, a penalty which the law will not enforce.

Lastly, there is on the plaintiff's side this argument, that unless all the formalities laid down in Section 8, Regulation XXV of 1802 be complied with, a sale otherwise valid is null and void..."

"The decree therefore of this Court now is that the defendant do deliver over to the plaintiff the land called Papuchetti Seri, which had been transferred to the possession of the late. Zamindár of Bobbili, under the Exhibit I produced by her in this suit, upon the plaintiff paying to the defendant Rupees 6,000."

The defendant appealed upon the grounds.—

(1.) That upon the true construction of the documents and upon the evidence, the Civil Judge ought to have found that there had been a conditional sale to the Zamindar of Bobbili which had become absolute by virtue of the failure to repay the price within the stipulated time.

(2.) That the Civil Judge was wrong in holding that such conditional sale would be invalid for want of registration.

The Advocate General for the appellant, the defendant.

Miller for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—The question is whether the transaction of 1835 is a mortgage or sale.

(*a*.) I M. H. C. R. 464.

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If we were bound by a case recently decided in the Privy Council, the appellant must necessarily succeed, for the Judicial Committee observe that there has been no course of decision in Madras admitting of relief after the time. They base their judgment upon this, and intimate that it would have been the other way if the fact were otherwise. It is otherwise, for the decisions of the late Sadr Court since 1858 have carried the doctrine so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule which the Sadr Court intended to follow, and have held the question one of construction, admitting however, for the purposes of the construction, other documents and oral evidence. On its face this document is plainly a sale with a condition for re-purchase. No Hindu would ever read it otherwise. The oral evidence adduced to show the intention other than the document imports is mere expression of opinion. The alleged payments to Kondal Rau's son are not marked as payments for any particular purpose. If, as the oral evidence alleges, they were on account of usufruct because the balance was discharged, it is inconceivable that so many years should have been allowed to elapse without claiming the property. The obtaining of an extension of the term is in favour of the sale as showing the belief of the vendor that the lapse of it would be fatal. The length of time (30 years) is in favour of the hypothesis of sale, as is the fact, much noticed in all the English cases, that there is no remedy for the vendee's money and no interest charged upon it. That the natural construction of the document is sale with liberty to re-purchase is plain; it seems to us that the circumstances of the case reinforce instead of explaining away that construction. *Gossip* v. *Wright*,(a) quoted by the Advocate General from the Law Journal and by Dart, V. & P. from the Jurist, is not in the regular reports. The doctrine of the case, so far as it was read, was quite consistent with that of *Alderson* v. *White*,(b) to which reference was made in II M. H. C. R. 422 (see note on that case, undoubtedly a very strong one, Dart, V. & P. 753). If the objection on the Registration Act were well

(a) 9 Jur. N. S. 592. (b) 2 De G. & J. 97.

founded, the result would be fatal to this suit, for the fact of a document not being enforceable as a sale will not convert it into a mortgage, and the result would be 30 years' possession of defendant without title. The evidence seems to us to leave no doubt as to the intention, and we reverse the decree of the Lower Court and dismiss the Original Suit with all costs. 1871. *December* 11. *R. A. No.* 48 *of* 1871.

Appeal allowed.

Appellate Jurisdiction. (a)

Special Appeal No. 368 *of* 1871.

SOMU GURUKKAL..................*Special Appellant.*
RANGAMMA'L and 3 others .... *Special Respondents.*

The plaintiff sued to recover certain immovable property sold to him by the 1st defendant by a registered deed of sale executed on the 23rd of July 1868. The 2nd, 3rd and 4th defendants pleaded a sale to them by the same party, the 1st defendant, on the 23rd March 1867, and that the 1st defendant, after receiving consideration in full, had improperly refused to have their deed of sale registered. The provisions of Section 49 of the Registration Act of 1866 precluded the reception in evidence of the prior unregistered instrument of conveyance, but the Lower Courts held that certain admissions made by 1st defendant in an enquiry held before the Registration officer were admissible in evidence to prove the sale to 3rd and 4th defendants. The suit was, therefore, dismissed with costs. Upon Special Appeal *Held*, by INNES and KINDERSLEY, J J., that the admissions made by 1st defendant were evidence against plaintiff, as made by one from whom plaintiff derived his title, but that the provisions of the Registration Act precluded any effect being given to the sale evidenced by such admissions : there being a writing, the sale could not be proved by mere oral evidence.

By INNES, J.—The term 'instrument,' in Section 49 of Act XX of 1866, is used on the understanding that the writing is not merely evidence of the transaction but is the transaction itself.

THIS was a Special Appeal against the decision of C. R. Pelly, the Acting Civil Judge of Tranquebar, in Regular Appeal No. 1 of 1870, confirming the decree of the Judge of the Court of Small Causes at Negapatam on the Principal Sadr Amín's side, in Original Suit No. 62 of 1869. 1871. *December* 29. *S. A. No.* 368 *of* 1871.

The plaintiff sued to recover certain land and houses under a deed of sale, Exhibit A, executed to him by 1st defendant on the 23rd July 1868, together with the value of produce carried off and trees felled by the 2nd, 3rd and 4th defendants. 1st defendant allowed the suit to proceed ex-

(a) Present :—Innes and Kindersley, J J.

1871. December 29. S. A. No. 368 of 1871.

parte; and the other defendants contended that the instrument sued on was the result of fraudulent collusion to deprive them of the property which they purchased from the said 1st defendant and her daughter-in-law, one Renganayanni Ammál, on the 23rd March 1867. The Principal Sadr Amín of Negapatam dismissed the suit. The plaintiff appealed.

The judgment of the Civil Judge, confirming that of the Principal Sadr Amín, contained the following:—

"The case stands thus:—1st defendant and her daughter-in-law, since deceased, executed, it is said, a deed of sale of the land for Rupees 800 on the 23rd March 1867, in favor of 3rd defendant as well as 4th who is a son of 2nd. On the 19th of June following, 1st defendant took this instrument for registration to the Sub-Registrar of Negapatam. On the 10th of August, she gave a deposition before him, Exhibit XV, admitting execution of the deed of sale and receipt of Rupees 400, and setting forth that there was a balance of Rupees 400 unpaid; and in it she also stated that her daughter-in-law had died subsequent to execution. Three of the attesting witnesses were then examined who deposed to its execution. The Sub-Registrar requiring production of a certificate under Act XXVII of 1860, nothing more was then done, and the document remained with him until the 24th February 1868 when 1st defendant prayed for its return, alleging unwillingness to have it registered. It was accordingly given back to her; and the order, Exhibit XIV, refusing to register it on the ground that 1st defendant had objected, was passed. Against this the 3rd defendant appealed to this Court on the 30th March 1868, when the then Acting Civil Judge found that execution of the document was not proved, his ground for so finding being that the document had not been formally delivered, and he rejected the appeal (Exhibit B). A special appeal to the High Court followed, which was dismissed on the ground that no appeal lay against the order of the Civil Court; and plaintiff has now sued on a deed of sale for the same property, which purports to have been executed to him by 1st defendant alone on the 23rd July 1868, which

has been registered, and adds that his purchase was followed by possession until January—February 1869, when he was ousted by 2nd, 3rd and 4th defendants. These defendants on the other hand (for 1st defendant allowed the suit to proceed ex-parte) have stated that plaintiff never has been in possession; that 1st defendant and her daughter-in-law sold the land to 3rd defendant for Rupees 800 and received Rupees 400 in cash, which was the balance of the purchase money after deducting the debts due to him by 1st defendant's deceased sons; that 3rd defendant then entered into possession, and has since remained in occupation; that the daughter-in-law subsequently died; and that 1st defendant, after presenting the deed of sale and admitting its execution before the Sub-Registrar, acting in fraudulent collusion with plaintiff withdrew it.

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The 1st defendant has not come forward to dispute the sale to the 3rd, and the efforts made by the contending defendants to get her into Court as a witness have proved abortive, though through no default on their part. Under the circumstances set forth above, they are powerless to produce the deed they allege, but its actual production is not indispensable for the requirements of their defence to this action. All requisite is evidence sufficient to show the sale to plaintiff, and on which he bases his title, to have been fraudulent, and this admits of proof without presentation of the deed of sale, which the contending defendants say was previously executed in favor of 3rd defendant; that 1st defendant and her daughter-in-law did so sell, is proved by her deposition, Exhibit XV, given before the Sub-Registrar, in which she further admits receipt of Rupees 400, a moiety of the purchase money, while the defendants allege that the other moiety was made up of the debts due to 3rd defendant on bonds executed by 1st defendant's sons, and by herself and daughter-in-law, and in support of this, have put in Exhibits I, II, III and IV, which purport to be debt bonds executed by them for Rupees 20, 80, 250 and 50, aggregating Rupees 400, exactly the balance, while 3rd, 4th and 5th witnesses prove that 3rd defendant's purchase was followed by immediate possession which has since continued. Plaintiff

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has, no doubt, adduced some oral evidence in support of his plea of possession, but read in connection with that on the other side and defendant's Exhibits, I attach no credit to it. To hold non-production of 3rd defendant's deed of sale of itself fatal to 2nd, 3rd and 4th defendant's plea would be in effect to give validity to a fraudulent conveyance to plaintiff, and the evidence to my view proves such to have been the case; there was a bonâ fide dealing with 3rd defendant for consideration followed by possession. 1st defendant had nothing left to dispose of, and even admitting plaintiff to have purchased, as he says, for a debt of Rupees 588-4-9 due on accounts and Rupees 211-11-3 in cash, all that can be said is that he purchased what the vendor had no right to sell, and the mere act of fraudulently withdrawing the conveyance to the prior vendee did not place 1st defendant in a position to convey the property to a third party, and concurring with the Lower Court in finding that the sale to plaintiff was fraudulent and not followed by possession, my decree will confirm that appealed against and assess appellants with costs."

The plaintiff preferred a special appeal on the following grounds:—

(1.) The prior sale to 3rd defendant was an absolute nullity for want of registration.

(2.) No evidence of such sale was admissible in the absence of a registered deed of sale.

(3.) The facts found by the Civil Judge did not amount to any fraud which would vitiate the sale.

The Advocate General for the special appellant, the plaintiff.

O'Sullivan for the special respondents, the defendants.

The Court delivered the following judgments—

INNES, J.—The questions involved in this special appeal arise out of the provisions of the Indian Registration Act.

The 1st defendant conveyed certain land and houses to 3rd and 4th defendants in 1867 by a written instrument which, though presented for registration, was at length re-

turned to the 1st defendant at her request, in consequence of her objecting to the registration of it. An unsuccessful appeal was made by 3rd and 4th defendants to the Civil Court, and, on 23rd July 1868, 1st defendant conveyed the same land to the plaintiff by a written instrument which was subsequently registered.

The provisions of Section 49 of the Registration Act of 1866 preclude the reception in evidence of the prior unregistered instrument of conveyance, but the Courts below have held that certain admissions made by the 1st defendant in the enquiry held before the Registration Officer are admissible in evidence to prove the sale to 3rd and 4th defendants.

Three questions have been raised before us in special appeal:—1st, whether the admissions of the 1st defendant were admissible evidence, as against plaintiff, of the prior conveyance to 3rd and 4th defendants. 2nd, supposing them to be admissible under the ordinary rules of the law of evidence, whether, notwithstanding, any effect can be given to the sale evidenced by such admissions. 3rd, whether there is any other admissible evidence upon which we could find the prior sale and give effect to it.

Upon the 1st question I entertain no doubt that evidence of the admissions of the 1st defendant, as to the terms of the sale, were admissible as against plaintiff. If the admissions had been made by plaintiff they would undoubtedly have been admissible; and being made prior to the conveyance to plaintiff, by one from whom plaintiff derives his title, they are, I conceive, equally as admissible as though made by plaintiff himself. The 2nd question is one of more difficulty. It is argued that the 49th Section of the Registration Act goes so far as to say that no instrument required by Section 17 to be registered shall affect any property comprised therein unless registered, that is to say, the *conveyance is of no effect*, is a nullity, and therefore what had purported to be a sale was no sale, and that evidence to the valid existence of what the law pronounces to be a nullity can have no effect given to it. A fallacy appears to lurk

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in this argument in the double meaning of the word "conveyance." Its proper signification is the actual transfer of the property, but it is commonly, though inaccurately, applied to the instrument of conveyance, which also is often improperly treated as the conveyance itself, of which it is only the evidence. Now the Section speaks of the *instrument*, and says it shall not only not be received in evidence, but shall not affect any property comprised therein. Certainly the language deals only with the instrument, and the question is whether, on a proper construction of the Section, it can be held to have the more extended meaning sought to be attributed to it. Similar inaccuracy of language is apparent in other parts of the Act, as in Section 2, in which an obligation is defined to be an instrument, and in Section 17, in which instruments are spoken of as operating to create, extinguish, &c., whereas they are, properly speaking, merely evidence of the operation.

Now, supposing the term "instrument," as used in Section 49, to apply strictly to the written evidence of the conveyance and not to the transaction itself, it is difficult to see to what state of circumstances the words "nor shall affect any property comprised therein" could have relation. The Section has already declared that the instrument shall not be received in evidence. How else can it, as a mere piece of evidence, affect property? The term 'instrument,' as used in this Section, must therefore, I think, be used on the understanding that the writing is not merely evidence of the transaction but is the transaction itself; and the effect of it in this sense is, in the present case, that the Court is precluded from recognizing the fact of a sale appearing in the admissions.

Then, as to the 3rd question, it must be answered in the negative. It is contended that although the sale was by a written instrument, and you cannot therefore prove the terms of it except by the production of the writing, yet you may prove the fact of the sale independent of the writing. This Court had a very similar question before it in the case reported in IV M. H. C. R. 312, in which I took part. There the question was whether there had been an exchange of

lands. The exchange, it was alleged, had been effected by an instrument in writing. That instrument was unstamped and inadmissible in evidence, but it was contended that it was open to the defendant to prove the fact of the exchange by other evidence. But we held that to prove the fact of the *exchange* you must show, not merely that one piece of land had changed to the possession of one party and the other to that of the other party, but you must show that each was the consideration for the other: that to do this is to exhibit the terms of the agreement, and that, as the agreement was in writing, it was the best evidence of the terms, and that the exchange therefore could not be proved without the writing, *Whitfield* v. *Brand* (16 M. & W. 282) is sometimes quoted as an authority for the proposition that the fact may be proved though the terms have been reduced to writing; but what was really decided in that case was that the relation of principal and agent might be established by oral evidence, though there was a writing as to the terms, and that the objection, if it could be taken at all, came too late. Proof of a sale necessarily involves proof of the consideration for which the property passed; that is, of the terms upon which the parties dealt, and it follows that in the present case there being a writing, the sale cannot be proved by mere oral evidence.

As the Court of First Instance and the Lower Appellate Court seem to have been much impressed, and perhaps influenced in their decisions by the fact of the 2nd conveyance being a fraud upon the 1st vendee, and this point has also been urged upon us by the learned Counsel for the 3rd and 4th respondents, as a reason for upholding the decrees of the Lower Courts; it is well to observe that in every case in which Section 49 of the Registration Act of 1866 comes to be applied as between competing vendees, there must, almost necessarily, be fraud on the part of the vendor, and this Section of the Registration Act would have scarcely any operation, if fraud were to interfere with the application of it. Before Act XIX of 1843, the second vendee under a registered title took nothing as against a prior unregistered vendee, if it appeared that he took with notice of the prior conveyance,

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but the Act referred to gave the 2nd vendee priority notwithstanding notice, it being the policy of the Legislature to compel registration, and with a view to this to prefer a registered vendee, notwithstanding that he was a party to the fraud by the vendor on the prior vendee, and the Registration Act XVI of 1864 and that of 1866 employ still more stringent means of compelling registration. Under Act XIX of 1843 an unregistered instrument was perfectly valid until a registered instrument came into existence, but, under Acts XVI of 1864 and XX of 1866, an unregistered instrument is absolutely without operation, quite independently of whether there is, or is not, a registered instrument in existence. The Registration Act aims at imposing a check on fraudulent litigation, but this important advantage cannot be secured without an innocent vendee occasionally suffering from his own ignorance or neglect of the provisions of the Law, and the fraud of the vendor and 2nd vendee.

Plaintiff is entitled therefore, I think, to a decree in his favor for the land conveyed to him by the registered instrument; but there has been, as yet, no finding on the 3rd issue recorded by the Principal Sadr Amín, and therefore, before we can dispose of this special appeal, we must require the Lower Appellate Court to take evidence and record a finding upon the issue,—

Whether the plaintiff is entitled as the proprietor, under the conveyance of the 23rd July 1868, to recover any and what sum on account of produce carried away and trees felled by 2nd, 3rd and 4th defendants, subsequent to that date?

KINDERSLEY, J.—The plaintiff sued to recover certain immovable property sold to him by the 1st defendant by a registered deed of sale executed on the 23rd of July 1868. The 2nd, 3rd and 4th defendants pleaded a sale to them by the same party, the 1st defendant, on the 23rd of March 1867, and that the 1st defendant, after receiving consideration in full, had improperly refused to have their deed of sale registered. An application to the Court to order the registration of their deed had been unsuccessful.

The Lower Courts held that it was unnecessary for the defendants to produce their unregistered deed of sale in evidence, because the plaintiff had not disputed the fact of its execution; and that the subsequent sale to the plaintiff was collusive and fraudulent. They therefore dismissed the suit with costs.

I am unable to concur in this view. I understand it to be a part of the case set up by the plaintiff that there has been no valid sale to the 2nd, 3rd and 4th defendants. It was therefore, I conceive, necessary for them to prove such sale, and this they could not proceed to do without attempting to produce the instrument by which the sale was effected. That instrument, as would appear from the pleadings, was not merely evidence of a sale, but the conveyance itself, the act and deed of the 1st defendant purporting to convey the property to the other defendants. But my judgment rests upon other grounds. It has been pointed out by the learned Advocate General that under the Indian Registration Act of 1866, Section 49, the sale to the 2nd, 3rd and 4th defendants, which was executed after that Act came into operation, was not only inadmissible in evidence, but also void as a conveyance of the property. It is conceded that the instrument was one required by Section 17 of the Registration Act to be registered, and Section 49 provides that no such instrument shall be received in evidence in any Civil proceeding in any Court, or shall be acted on by any public servant, *or shall affect any property* comprised therein, unless it shall have been registered. It is clear, therefore, that the property now in litigation was not in any way affected by the unregistered deed executed by the 1st defendant in favour of the other defendants. And the defendants having consented that the terms of the conveyance should be expressed in that deed, they are not entitled to get behind that deed and prove the sale by a previous oral agreement to sell.

The Civil Court has found that the sale to the plaintiff was collusive and fraudulent. But I understand these expressions to mean only that it was a sale in fraud of

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the right of the 2nd, 3rd and 4th defendants, not that it was not a real sale to the plaintiff. And the registration seems to indicate the reality of the conveyance. Now the 2nd, 3rd and 4th defendants having acquired no right to the property under their unregistered deed, it seems hardly possible that they should be defrauded by the subsequent sale to the plaintiff. I am, therefore, of opinion that the decrees of the Lower Courts ought to be reversed and the issue referred as proposed by Mr. Justice Innes.

Appellate Jurisdiction (a)

Regular Appeal No. 51 *of* 1869.

MUNGAMURU ANANTA LAKSHMI-NA'RASU PANTALU .... } *Appellant (Plaintiff.)*

SRIMANT RA'JA YARLAGEDDA' ANKINID BA'HA'DU'R, ZAMINDA'R, and 22 others .... } *Respondents (1st to 23rd Defendants.)*

Upon the construction of the passage in Section 9 of Act XIV of 1859 "if any document necessary for establishing such right shall have been fraudulently concealed."—*Held*, that the preceding words of the Section show clearly that the document must have been fraudulently concealed from the knowledge of the plaintiff; he must through the fraudulent concealment be unaware of its existence, and when this is so, the Statute runs against the person guilty of the fraudulent concealment, or accessory thereto, from the time at which plaintiff had the means of producing or compelling its production, if it is a document necessary for establishing such right of action.

What is a "document necessary" considered.

1870. March 1. R. A. No. 51 of 1869.

THIS was a Regular Appeal against the decision of R. B. Swinton, Civil Judge of Gantúr, in Original Suit No. 3 of 1867.

Mayne for the appellant, the plaintiff.

Párthasárathí A'yyangár for the 1st and 2nd respondents (1st and 2nd defendants).

The facts sufficiently appear in the following

JUDGMENT :—The question is whether the Civil Judge has rightly decided that a suit for recovery of the money due upon two documents, dated August 1851, is barred by the Act of Limitations. It is clearly barred unless saved by the

(a) Present :—Holloway and Collett, J J.

exception contained in Section IX, and the meaning of that exception and its application to the facts of this case are the points for our determination. The first part of the Section deals with the concealment by fraud from the plaintiff of knowledge that there is a right of action, and the Section then goes on "if any document necessary for establishing such right shall have been fraudulently concealed." It seems to us that the preceding words of the Section show clearly that the document must have been fraudulently concealed from the knowledge of the plaintiff; he must through the fraudulent concealment be unaware of its existtence, and, when this is so, the statute runs against the person guilty of the fraudulent concealment, or accessary thereto, from the time at which plaintiff had the means of producing, or compelling its production, if it is a document necessary for establishing such right of action. The facts of the present case are, as they were shown in Regular Appeal No. 50 of 1861, to which the assignor of the plaintiff and the obligor were both parties, that in execution of a decree against the obligee's mother these bonds were, in consequence of the pressure of his proceedings and the terror which they created, delivered to one Putturi Ananda Rau, now represented by the 24th defendant.

On the 11th February 1861 the obligee brought her suit against P. Ananda Rau and the obligor for the return of the documents or their value. Ananda Rau alleged an assignment, and that he had been paid off by the obligor, and the obligor answered that this was the case, and that the documents had been mislaid. The Civil Court of Gantúr decreed for the plaintiff, directed the delivery up of the documents or payment of the principal with interest and costs, and this Court in appeal confirmed that decree. Now, it certainly seems to us that this is no case of concealed documents within the meaning of this Section. It is a case of extorting documents by illegal pressure from the bailee. The documents were never fraudulently concealed; they were wrongfully extorted. The plaintiff's documents were not fraudulently concealed from her knowledge. Further, if it were a fraudulent concealment, we are of opinion, as the

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result clearly showed, that the plaintiff had in 1861 the means of compelling their production, and this suit for the money lent would be barred because not brought within six years of that time; these words in the alternative furnish a strong support to the construction that the documents, to be within the exception, must be fraudulently concealed from the knowledge of the plaintiff. Moreover, we are of opinion that the documents were not necessary within the meaning of the Section. In one sense every document may be said to be necessary, if the word necessary is to mean any thing which it would be more prudent to be provided with. In 1861 the execution of the documents was admitted; the defence was that they had been assigned. Their non-production was almost fatal, not to the plaintiff's contention, but to that of the defendants.

No reasonable man would or could believe that the obligor would really destroy or mislay these documents, and the Court did not believe it; and if the plaintiff had at that time framed her suit for the recovery of the money, she must have recovered. It is easy to put cases in which the document would be necessary, as in the case of a will, or a codicil fraudulently concealed from the knowledge of the legatee, but the documents in the present case do not seem in themselves, and still less upon the facts of the case, to be necessary within the meaning of the Section. The documents are only evidence of the obligation, and it seems difficult to see when the statute is to apply if such documents are to be declared necessary.

We think, therefore, that there was no fraudulent concealment at all within the meaning of the Section; that if there was, it was not a fraudulent concealment of documents necessary within that meaning, and that, if both these requirements had been fulfilled, this suit would still be barred, because in 1861 the plaintiff had the means of compelling their production. In our opinion this appeal should be dismissed with costs.

Appellate Jurisdiction (a)

Special Appeal No. 455 *of* 1871.

CHALLA PA'PI REDDI and another....*Special Appellants.*
CHALLA KOTI REDDI *alias* KOTAPPA..*Special Respondent.*

Suit to recover a share of the property of the plaintiff's maternal grandfather. The facts found were as follows.—Plaintiff's mother and 1st defendant's mother were sisters, daughters of one M., who, having no male issue, selected, in pursuance of a special custom, the 1st defendant's father as a son-in-law who should take his property as if a son. On the death of M. the 1st defendant's father entered into possession of the property and, afterwards, during the minority of his son (1st defendant) associated with himself the plaintiff, on promise of a share. In accordance with this agreement the plaintiff joined the 1st defendant's family and continued for many years aiding in the management and improvement of the property, until, a short time before the present suit was brought, the 1st defendant turned the plaintiff out of doors and refused to give him the promised share. Upon these facts *Held*, by HOLLOWAY and INNES, JJ.—That the 1st defendant's father was what is called, in English law, a purchaser, and had all the powers of disposition existent over self-acquired property. That, also, there was a complete adoption or ratification of the father's contract by 1st defendant, and that he ought to be held to it.

By INNES, J.—That the right of 1st defendant's father to dispose of property self-acquired might depend upon whether 1st defendant was or was not in being at the date of the acquisition.

THIS was a Special Appeal against the decision of J. Wilkins, the Judge of the Court of Small Causes at Masulipatam, on the Principal Sadr Amín's side, in Regular Appeal No. 82 of 1871, confirming the decree of the Court of the District Munsif of Gautúr in Original Suit No. 142 of 1868. 1872. *January* 6. *S. A. No.* 455 *of* 1871.

The suit was brought for the recovery of moveable and immoveable property worth Rupees 996-12-7, and falling to the ⅓rd share due to plaintiff out of the estate of Duggampudi Musalireddi, plaintiff's maternal grand-father, now in the possession of 1st defendant.

The plaint set forth as follows:—

"The 1st defendant's mother Bakkammah, and the plaintiff's mother Subbamma are uterine sisters. The 1st defendant's father went and lived (Illatam) in the house of their father Duggampudi Musalireddi. Subsequently on the

(a) Present:—Holloway and Innes, JJ.

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extinguishment of the said Musalireddi's family, the estate fell into the possession of the 1st defendant's father, who having no other issue than the 1st defendant, and having none to look after the affairs of cultivation, and as the plaintiff also was an heir to the estate of the said Musalireddi by virtue of his being Musalireddi's daughter's son, took the plaintiff above 25 years ago on the condition of giving him also a share in the said property. The plaintiff therefore continued from that time to assist the 1st defendant's father in carrying on cultivation, &c., and improved the property. On the death of the 1st defendant's father, a dispute having arisen between the plaintiff and the 1st defendant, the plaintiff demanded of the latter his share, and the 1st defendant executed three years ago a karárnáma to the effect that the plaintiff should reside with 1st defendant only for 10 years, and that afterwards the 1st defendant should take two shares to himself and give one share to plaintiff. While so, the 1st defendant, about 15 or 20 days back, unlawfully turned plaintiff out of door through the instigation of the 2nd defendant, and took possession of the said document. The plaintiff, therefore, sues to recover his ⅓ share, according to the terms of that karárnáma."

The 1st defendant denied the plaintiff's claim, and the fact that the plaintiff was brought to his (defendant's) house on the condition of giving him a share, as also the fact of the execution of a karárnáma agreeing to give the plaintiff a third share, and alleged that as the existing property came to his possession by purchase, the plaintiff could have no manner of right thereto; that in order to liquidate a debt contracted from him (1st defendant) the plaintiff entered his (defendant's) house as a servant, but was driven out by 1st defendant for bad conduct, and that of the ground and houses specified in the plaint, he (1st defendant) had already sold some to the 2nd defendant.

The 2nd defendant stated that he purchased of the 1st defendant two pieces of land four years ago and continued since to enjoy the same, having built a house thereon, and that he ought not to have been included in the suit.

The District Munsif found that the property in question, originally belonged to Musalireddi. That the 1st defendant's father had succeeded to the property as son-in-law, by virtue of a special custom, and that he had taken the plaintiff into his house and executed a karárnáma promising him a share, as alleged in the plaint. The Munsif, therefore, adjudged to plaintiff the one-third share claimed by him with costs from the 1st defendant, declared that the sale to the 2nd defendant should operate only against the share of the 1st defendant, and exonerated the 2nd defendant from liability.

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From this decision the defendants appealed.

The Principal Sadr Amín in his judgment said—

"The preliminary objection urged against this suit is that the document referred to by the plaintiff in support of his claim not having been registered, it cannot be taken as evidence, and hence the plaintiff ought to have been nonsuited.

This document was not produced, but is alleged to have been made away with by the 1st defendant. The plaintiff allows that it was never registered.

It is alleged in the plaint that this document was executed to plaintiff by 1st defendant, agreeing that plaintiff should reside with him for 10 years, and that after the expiration of that term, or earlier in case of dispute, the plaintiff is to be entitled to one-third share of the property of their mutual maternal grandfather, Duggampudi Musalireddi, which 1st defendant inherited from his father, Musalireddi's son-in-law. The plaintiff charges 1st defendant with having turned him away three years after the agreement, and hence sues for his one-third share, according to the terms of the said written agreement, consisting of real and personal property, the former of which exceeds one hundred rupees.

The plaintiff shows by his plaint that he also had a right, by being a grandson of Musalireddi, to a share in his

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said property. He alleges that Musalireddi from domestic bereavement transferred the possession of his property to his son-in-law, 1st defendant's father, who, having no one else but his minor son, 1st defendant, and as plaintiff was also an heir of Musalireddi, took plaintiff about 25 years ago on condition of giving him a share in the property, and that he assisted in the management and improvement of the property, and that 1st defendant executed the agreement sued upon after the death of his father.

There is no doubt that the agreement referred to ought to have been registered under Act XVI of 1864, and that, not being so registered, it cannot be received as evidence, and that the plaintiff's claim so far as it is supported by that document cannot stand.

The question, then, is whether the plaintiff has not a right independent of the document referred to, *i. e.* of his co-share with 1st defendant as Musalireddi's grandson, and as orally admitted by 1st defendant's father when he was admitted into the family twenty-five years ago, and by the promise of a share, and having moreover contributed towards the improvement of the estate. This point was laid down in the issues by the Original Court and the evidence gone into.

The 1st defendant submits that the plaintiff cannot sue as Musalireddi's heir, as his daughters are still alive.

These females have offered no objections either to 1st defendant's or plaintiff's right or enjoyment. It is urged by plaintiff that, in the absence of sons, Musalireddi took to him his son-in-law, to whom he made over all his property, and that this son-in-law, in consequence of his own son, the 1st defendant, being a minor, and in consideration of plaintiff being an equal co-sharer, admitted the plaintiff into his family on a promise to allow him a share, and that plaintiff joined in the management and improvement of the estate for upwards of twenty years.

The plaintiff at this time had not only a reversionary right to the estate through his mother, but was at once taken

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into co-parcenary with the son-in-law of Musalireddi who had been entrusted with the property, with the promise and engagement to allow him a share. This has been clearly established by evidence adduced by plaintiff and examined by the Court, and it is equally proved that plaintiff had, since then and up to shortly before the suit, been in the enjoyment of the property with the 1st defendant.

BIBL. CODR. COLL. OMN. AN. M. OXON.

Such being the case, the document upon which plaintiff bases his claim was merely a confirmation of a previous contract orally entered into by 1st defendant's father. By this oral contract, independently of the subsequent document, the plaintiff possessed a share of the property, and he has been in the enjoyment of his share conjointly with 1st defendant, although without a regular division, until he was turned out by the 1st defendant a few days before institution of the suit.

Hence although the plaintiff may not be able to establish his share by the written document of 1st defendant, which renewed and established the original oral contract entered into by 1st defendant's father, the plaintiff does not forfeit his right, but still holds his share by virtue of the original oral contract, the proof of which has been established by witnesses according to the issue framed by the Court, which right he might have claimed at any time so long as he was not barred by adverse possession, which must be reckoned from the time he was turned away by 1st defendant. Hence his claim is not barred, and his suit for one-third is both reasonable and just.

Hence there is no ground for disturbing the finding of the District Munsif, and his judgment is therefore confirmed, and appellant charged with costs."

Against this decision the defendants preferred a Special Appeal.

Sloan for the special appellants, the defendants.

J. H. S. Branson for the special respondent, the plaintiff.

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The Court delivered the following judgments,

HOLLOWAY, J.—The objection that the oral agreement is not found to have specified the share is of no weight. In the absence of such specification, the meaning is plainly—"I admit you to the rights of a co-sharer."

The finding is that defendant's father obtained his rights in pursuance of a special custom which entitled Musalireddi to select a son-in-law who should take his property as if a son. The custom, therefore, amounts to a power of disposition inconsistent with the ordinary rules of law. It is further found that during the minority of the 1st defendant, his father associated with himself the present plaintiff on promise of a share, and that the plaintiff has, in accordance with the agreement, been in the family ever since aiding in its management and improvement. The first question is whether a person, so coming in by exception to the ordinary rule of inheritance, is thereby placed in the position of a son, who at his birth becomes a joint tenant, with all the rights of such a son and with all the restrictions upon alienation which would exist as to his own son if it had been an estate of inheritance. It seems to me that no such restriction upon the powers of Musalireddi was created by his following the custom. It was suggested by Mr. Sloan, who always by his careful research assists the Court in matters of this kind, that the custom is the offspring of the doctrine of the appointed daughter. The power of complete disposition as against both a widow and daughters, has, rightly or wrongly, been upheld, and there would be great difficulty in saying that the son-in-law so affiliated could be in a better position. It would certainly not be in accordance with legal logic to apply to this exceptional heir, doctrines derived from the ordinary system from which it is a derogation. There is nothing illogical in saying that the person so affiliated shall inherit all of which the affiliator died possessed, but that he does not and cannot stand in the same position as one who became a joint tenant at the instant of birth. It seems to me that the 1st defendant's father was what we should in English law call a purchaser,

and that he had all the powers of disposition existent over self-acquired property. I am quite aware that there is a doubt of the power of a father to alienate even self-acquired real property, but the tendency of the decisions, in accordance with reason, is to put all property upon the same footing. My conclusion, therefore, upon this part of the case is that a person succeeding to property by virtue of this customary rule and in supersession of the ordinary rules of law is a self-acquirer, and that the obligation of the father is one which the son is bound to satisfy, and that in so deciding the Lower Court is right: were it otherwise, on the findings that the plaintiff in accordance with the contract did join the family and did labour for many years, that the son on the death of the father took the benefit of those services and allowed their continuance, I should feel great difficulty in saying that there was not a complete adoption and ratification of the father's contract, from which it would be fraudulent now to seek an escape. As to that portion of the decree which declares that the portion sold is to be included in 1st defendant's share, it is impossible to say whether it is right or wrong. It will be right if the act was that of 1st defendant alone, and if he has taken the whole of the proceeds, wrong if the sale was made with the assent of the plaintiff while he was living in communion. To determine whether the decree should be modified on this point, I think that the following issues should be referred:—

(1.) Was the sale made before or after the severance of the communion by the act of the 1st defendant?

(2.) If before, was the sale made either with the plaintiff's assent or for proper family purposes?

INNES, J.—I agree entirely as to the view of the right acquired by 1st defendant's father through affiliation to Musalireddi. But with regard to the power of 1st defendant's father to dispose of property self acquired, I think the right to do so may depend upon whether 1st defendant was or was not in being at the date of the acquisition as, at present, it appears to me, upon the texts of

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Hindu Law which apply to the subject, that by birth a son acquires an inchoate right in what even at that date belongs to the father, whether self-acquired or family property. But I agree that, according to the findings, there was a complete adoption or ratification of the father's contract by 1st defendant, and that he ought to be held to it. Plaintiff is therefore a co-sharer in the property, and, for the solution of the other questions in the case, I agree in the issues proposed by Mr. Justice Holloway.

Appellate Jurisdiction. (a)

Special Appeal No. 78 *of* 1871.

VENKATARA'YAR and two others.........*Special Appellants.*

SRI'NIVA'SA A'YYANGA'R and 5 others...*Special Respondents.*

It is not competent to the Archakas of a Pagoda of their own authority to make an alienation for the purpose of altering the form of worship in the Pagoda, or in contemplation of such alteration. Any assignment of the office must carry with it the duty of continuing the form of worship hitherto observed.

1872. January 24. S. A. No. 78 of 1871.

SPECIAL Appeal against the decision of W. Hodgson, the Acting Civil Judge of Cuddalore, in Regular Appeal No. 195 of 1867, confirming the decree of the Court of the Principal Sadr Amín of Cuddalore in Original Suit No. 5 of 1866.

This was an action for the recovery of the office of Archakan (priest) and Stanigan, and certain máuiam lands and other property attached to Latchmi Naráyana Perumal Kovil in the village of Addúr, and also for the Pagoda itself.

The plaintiffs stated that the temple in question was founded by their ancestors, and that the management thereof and its endowments, together with the offices of Archakan and Stanigan, were since vested in their family, and that in 1863 the first defendant made an unlawful alienation thereof to the prejudice of their (plaintiff's) interests. Hence this suit.

The 1st defendant was declared ex-parte.

(a.) Present:—Innes and Kindersley, JJ.

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The 2nd, 3rd and 4th defendants denied the plaintiff's claim *in toto* and contended that the management of the temple and its endowments always vested in their family, and that the offices of Archakan and Stanigan were assigned to them, under Exhibit V, by the defendants 1 and 5.

The 5th defendant replied that he did not relinquish his right and interest in the pagoda in favor of the 2nd, 3rd and 4th defendants, though his brother the first defendant did so.

The 6th defendant alleged that he had a right of occupancy in respect of three quarters of a káni of mániam land in his possession.

The Court of First Instance dismissed the 1st plaintiff's claim as being altogether unsupported by any evidence, and, disallowing that part of the claim set up by the 2nd and 3rd plaintiffs which related to the pagoda and its endowments, awarded to them "a two-sixth" share in respect of the office of Archakan of the said temple, with costs.

From this decree both parties appealed.

The Civil Judge delivered the following judgment :—

"The principal point to be determined in these appeals seems to be whether, as regards the 2nd and 3rd plaintiffs, sons of the 5th defendant, the alienation by their father and the 1st defendant his brother was, without their consent, made for a purpose justified by Hindu Law as a legal necessity for the benefit of the family, and so binding on the sons, or whether such alienation was in fact and in law a mere surrender on the part of their father (the present 5th defendant) and their uncle (the 1st defendant in this suit) of their respective shares of an office hereditary in this undivided family. In the absence of any proof as to the existence of any such necessity, the Lower Court was right in viewing the alienation by the 1st and 5th defendants as affecting their respective shares alone, and in awarding to the 2nd and 3rd plaintiffs the proportion of shares to which, as sons of the 5th defendant, they would be legally entitled on a division enforced by a suit. The question of the ownership of

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the Pagoda at Addúr having been determined in Original Suit No. 215 of 1831 on the file of the Assistant Judge, which was confirmed in Appeal Suit No. 11 of 1833 by the Civil Judge of Chingleput, as vesting in the Tengala sect, the plaintiffs, who are admittedly of the Vadagalay sect, are estopped from advancing their claim to the pagoda. The only remaining question is whether the 1st plaintiff, by reason of his relationship to the 2nd and 3rd plaintiffs, is entitled to any share in the office of Archakan in this particular temple; but admitting him to be so, it seems clear from the evidence that he has lost such right by the lapse of time during which he has allowed it to be in abeyance, having for more than 12 years taken no part in the conduct of worship in the pagoda. The 2nd, 3rd and 4th defendants admitted in their statements that the 1st defendant and his father before him were appointed by their (2nd, 3rd and 4th defendants) ancestors to the office of Archakan, and however distressing this may be to their feelings under the existing state of rivalry between them, the rights of the 2nd and 3rd plaintiffs cannot be disturbed or ignored on that account. The decree of the Lower Court is therefore confirmed and the appeals in both cases dismissed with costs."

The plaintiffs preferred a special appeal against this decision.

At the 1st hearing of the appeal (18th August 1871) the following issues were referred to the Lower Appellate Court.

(1.) Whether the duties of the office of Archakan have hitherto been performed and the emoluments of the office received by one member of the plaintiffs and 1st and 5th defendants' family, or by several members jointly or alternately?

(2.) Whether the rightful holder or holders of the office for the time being have the right of assigning it to strangers?

The Civil Judge found upon the 1st issue—" that the duties of the office of Archakan have been performed, and

the emoluments of the office received by the 1st and 5th defendants jointly." And upon the second issue—" that while the rightful holder or holders for the time being of the office of Archakan have the right of assigning it to strangers, such strangers must, from the nature of the office, be of the same denomination or sect, and as vendees are merely entitled to, and concluded by, what the vendors have a good title to sell; and that the continuance of such rites and ceremonies as may have already been prescribed for observance, and appertain and are essential to the priestly office in this temple, must be a condition precedent to, or rather is inherent in, such sale." 1872. *January* 24. *S. A. No.* 78 *of* 1871.

This day the case came on again for hearing. 1872. *January* 24.

Johnstone for the special appellants, the plaintiffs.

Sanjiva Rau for the 2nd and 3rd special respondents, the 2nd and 3rd defendants.

The Court delivered the following

JUDGMENT:—The Civil Judge has now found upon the issues referred to him that the 1st plaintiff's office as Archakan was limited to Karunguli, and that the púja at the Pagoda at Addúr was ordinarily performed by the 1st defendant, assisted occasionally by the 5th defendant, the father of the 2nd and 3rd plaintiffs. Also that though the office and emoluments of the Archakan may be alienable, it has not been shown that any such sale as would change the form of worship has ever taken place.

The Civil Judge has further found that the 2nd, 3rd and 4th defendants, immediately after purchasing the office of Archakan from the 1st and 5th defendants, endeavoured to supplant the previous Vaikunsum form of worship by a service in accordance with the Pancharatrum formulary. And it further appears that such change of the form of worship, if made every month as contemplated by the decrees of the Courts below, would be very inconvenient and expensive.

1872. *January* 24. S. A. No. 78 *of* 1871.

It is unnecessary for the purposes of this decision to determine whether the office of Archakan is in any case alienable. We are clearly of opinion that it is not competent to the Archakas of their own authority to make an alienation for the purpose of altering the form of worship in the pagoda, or in contemplation of such alteration. Any assignment of the office must carry with it the duty of continuing the form of worship hitherto observed. The 2nd, 3rd and 4th defendants in this case have evidently purchased the office with the intention of making a very important alteration in the service of the temple; and we think that their purchase for such a purpose ought not to be allowed.

On the other hand we do not see how the plaintiffs, upon the facts found, can be entitled during the life of the 1st and 5th defendants to a larger share than the Courts below have decreed to them.

We shall, therefore, modify the decree of the Civil Court by declaring the alienation of the office of Archakan of the pagoda in question with the lands and emolument attached to that office to the 2nd, 3rd and 4th defendants invalid. We think that the plaintiff's costs in this Court and in the Civil Court should be borne by the first five defendants. The order of the Principal Sadr Amín as to the costs in his Court may stand.

Appellate Jurisdiction. (a)

Regular Appeals, Nos. 126 *of* 1870 *and* 2 *of* 1871.

J. D. ROBINSON, ESQ., Collector of North Arcot............ .... } *Appellant in No.* 126.

MANIYAM NARASIMMA GAUNDAN and 2 others......... .... } *Appellants in No.* 2.

versus

A'YYA KRISHNAMA CHA'RIYA'R and 16 others......... .... } *Respondents.*

The tank used for the irrigation of the plaintiffs' village was supplied in part by rain water falling on the lands of the village occupied by defendants 9 to 17, and the bund of the tank used formerly to throw back the waters so flowing into the tank on to the lands of defendants, where it remained till gradually drawn off into the area of the tank. Defendants 9 to 17, through the agency of the Government, relieved themselves of this inconvenience by making a work for draining off the water so periodically thrown back upon their land. A channel was also constructed for conducting a supply of water to the plaintiffs' tank. Plaintiffs, however, claimed to have the former state of things restored, on the ground that they had a prescriptive right to throw back the water on to defendants' lands and to keep it there till required for use. *Held*, that there was here no object over which a right could be acquired.

THESE were Regular Appeals against the decision of C. G. Plumer, the Acting Civil Judge of Chittúr, in Original Suit No. 26 of 1868. 1872. *January* 26. *R. A. Nos.* 126 *of* 1870 *and* 2 *of* 1871.

The suit was brought to establish plaintiffs' right to retain on certain lands, attached to Sidhanti village, a supply of water for the use of their tank of Avalur, to cause the removal of a bund and tunnel recently erected by orders of the 1st defendant, and to recover from defendants a sum of Rupees 600 on account of the loss of produce sustained by plaintiffs in 1867, in consequence of defendants' acts.

The plaint alleged that the plaintiffs' lands were irrigated by a tank to the west of the village; that the defendants 9—17 who lived at Sidhanti possessed 30 kánis of nanjah lands in front of the bed of the said tank; that according to long prevailing usage these lands were only to be cultivated when the said tank was dry; that when the tank was full the said 30 kánis of nanjah land retained water to a depth varying from 1 to 1½ yards; that surplus water from the

(a) Present :—Holloway and Innes, JJ.

1872. January 26. R.A. Nos. 126 of 1870 and 2 of 1871.

villages of Karevedu and Sidhanti, lying west of the said tank, flowed to the said tank and to plaintiff's channel and contributed to the irrigation of plaintiffs' nanjah lands; that defendants 9—17 by permission of defendants 1—4, and with the assistance of defendants 5—8, raised a bund east and north of their nanjah lands, and also built on the north a tunnel about 3 feet × 3 feet, thereby causing the water obstructed by the bund to empty itself into the channel of another tunnel instead of flowing as usual into the plaintiff's tank :

That these acts on the part of defendants were opposed to long prevailing usage and prejudicial to plaintiff's right :

That the execution of the said works was commenced in October and finished in December 1867 :

That the defendants by their acts caused a decrease of two months' supply in the usual quantity of water retained by the tank, and that serious damage and loss had accrued to plaintiffs :

That the plaintiff's objections to the said works were disregarded by defendants 1—4 who assisted the defendants 9—17 in depriving plaintiffs of their rights :—

And the plaintiffs prayed that a decree might be passed directing the removal of the said bund and tunnel, establishing plaintiffs' right to retain in the said 30 kánis of nanjah, in front of the bed of their tank, a supply of water varying from 1 to 1½ yards height, and their right to receive into the said tank and into their channel the surplus water flowing as usual from the villages of Sidhanti and Karevedu through the said nanjah lands; and adjudging defendants to pay plaintiffs a sum of Rupees 600 with costs and further interest.

The 1st defendant (the Collector of the District) put in a written statement to the following effect ;—1st, He denied that the plaintiffs had suffered or would suffer any damage by the embankments and sluice of which they complained; 2nd, he asserted that these works were necessary for the pro-

1872. January 26. R.A. Nos. 126 of 1870 and 2 of 1871.

tection of lands in Sidhanti; 3rd, that even if any loss of water were caused to plaintiffs by these works (which the 1st defendant denied) a full equivalent would be given by a channel which had recently been made to the Avalur tank from the Palar anicut through lands belonging to villagers of Sidhanti; and, 4th, that the Government, as owner of sources and works of irrigation, had a right to exercise their control for the benefit of the public, and in this case they had done so without causing damage to the plaintiffs, and he therefore prayed that the suit might be dismissed with costs.

The 2nd defendant prayed to be released from the suit, pleading that he had acted throughout under the orders of 1st defendant, his superior officer.

The defendants 5—7 in their joint written statement supported the plaintiffs' claim.

The defendants 9—17 put in a written statement in which they alleged that the plaintiffs had no right to sue for the removal of the tank and bund referred to in the plaint; that when the tank in Avalur was supplied by only one spring-channel and had a scanty supply of water, some of the cultivable lands of these defendants lying in front of the bed of the tank were immersed in water to the depth of half a yard, but that the water used to run off through the Vettu Madei of the said tank; that there was no obstruction to the cultivation of 60 and odd cawnies in front of the bed of the said tank; that about 10 years ago Government, in order to give a full supply of water to the said tank, and at the request of the people of Avalur, newly constructed a channel along the north side of the cultivable lands of Sidhanti and filled up the Vettu Madei of the said tank; that as no bank was raised to this channel the water overflowed the lands of these defendants, left sandy deposits, and greatly injured the crops; that the said channel abundantly and quickly supplied the said tank with water; that in consequence of the increased supply of water thus afforded the water overflowed the tank and flooded the lands of these defendants thereby causing them considerable loss; that the people of Sidhanti made many complaints to the revenue authorities; that they inspected the spot and passed

1872. January 26. R. A. Nos. 126 of 1870 and 2 of 1871.

orders, in pursuance of which and of the deposition given by defendants 5—8, the principal ryots of Avalur, the Engineer Officers constructed the tunnel and bank referred to in the plaint; that these works caused no decrease in the supply of water in the Avalur tank, nor any loss of cultivation; that the amount of damages claimed by plaintiffs was excessive.

The following issues were settled.

I. Whether the plaintiffs are possessed of the right to retain water in the nanjah land of defendants situated in front of the bed of plaintiffs' tank at Avalur and to receive into the said tank and into plaintiffs' channel the surplus water flowing from the villages of Sidhanti and Karevedu through defendants' nanjah lands.

II. Whether the erection of the bank and the construction of the sluice referred to in the plaint have created a disturbance of the said rights.

III. Whether the 1st defendant as the representative of Government was legally entitled to erect the said bank and to construct the said sluice.

IV. Whether the plaintiffs in consequence of the erection of the said bank and the construction of the said sluice have sustained any loss, and if so, what amount of damages are they entitled to recover from the defendants.

The judgment of the Civil Judge contained the following:—

"Upon the 1st Issue.—During the argument it was admitted by defendants' vakil that the plaintiffs were possessed of the rights claimed by them, and indeed the evidence oral and documentary on both sides abundantly proves that from time immemorial the plaintiffs have been possessed of and enjoyed those rights.

The Exhibit A, which is a document executed by the inhabitants of Sidhanti, defendants' village, in 1815, showing the then existing usage which regulated the distribution of water to the lands in their village, proves that at that time the inhabitants of plaintiffs' village were in possession of the rights which they now seek to establish by a decree of this Court,

It is clear, then, that at some time previous to 1815 the plaintiffs or their ancestors, the owners of the taluq of Avalur, had acquired over a certain portion of the lands of Sidhanti the right to compel the owners thereof to allow the surplus water to remain on those lands and to flow uninterruptedly thence into the tank of Avalur.

It is equally clear that from 1815 up to 1866 the plaintiffs uninterruptedly enjoyed the right which they had previously acquired. I find, therefore, the first issue in favor of the plaintiffs.."

" It is clear from the report made by the Head Assistant Collector that the whole of the 30 kánis of land of Sidhanti will be most effectively drained by the newly constructed tunnel, and it is also clear from the evidence that the water so drained instead of flowing into the plaintiff's tank will make its way into the tank of Perumbulipakam.

I am of opinion, therefore, that the tunnel and so much of the newly erected bank complained of as is marked in the plan " C," " B" have caused a substantial injury to the plaintiffs, and on the second issue I find in their favor."............

The 3rd Issue.

Here I find myself face to face with a most difficult question. I can find no judicial decision to govern the case, and I am not referred to any Legislative enactment conferring on the Collector, as the representative of Government, the powers for which 1st defendant contends in the 4th para. of his written statement.

In a case recently decided by the High Court (*Regular Appeal* 122 *of* 1868, 5 M. H. C. R. 6), the Chief Justice in his judgment remarked " however lawful the exercise of such a power (the power which 1st defendant seeks now to establish) may be in regulating the distribution of water amongst Ryotwári villages held immediately of the Government, or to the lands of proprietors or their tenants whose enjoyment of it is simply permissive," &c., &c., and Mr. Justice Innes in his judgment in the same case makes somewhat

1872. January 26. R. A. Nos. 136 of 1870 and 2 of 1871.

similar remarks, though he restricts the exercise of this power to cases in which rights have not as yet been acquired. These are "obiter dicta," but with the restriction imposed by Mr. Justice Innes, I believe they are most valuable guides to enable me to arrive at a correct decision on this "vexata quæstio."

No doubt, where existing rights are not disturbed, Government has the power to regulate the distribution of water amongst Ryotwári villages, but in my opinion they have not the right, when so distributing it, to interfere with and destroy existing rights.

Special legislation was considered necessary to confer on Collectors the power to take up land even though wanted for public purposes. If the Government has not the power to interfere with or determine existing rights in land without a special enactment, I think it may fairly be reasoned that without such special enactment Government could not prejudicially interfere with or destroy existing rights to the use of water.

In the present case the 1st defendant has by the erection of the bund B to C, and the construction of the tunnel, wholly extinguished an easement which plaintiffs had acquired on the lands of defendants 9—17, simply because those defendants said to him "the burthen imposed on us by the easement is heavy, remove it, we pray, from us," and without any consideration for the plaintiff's rights he did remove it.

It may be that it would be advisable to invest Collectors with the absolute power claimed by 1st defendant, but in the present state of the law I am of opinion that they have no such power, and that in this case the 1st defendant by the erection of the bund and construction of the sluice to the prejudice of the existing rights of plaintiffs acted "ultrá vires." On the 3rd issue, therefore, I find for the plaintiffs.

The 4th issue.

I am of opinion that the plaintiffs have failed to make out their case. I don't think that they have satisfactorily

proved that the decrease in cultivation which from the account "G" undoubtedly occurred in 1867, was owing to the construction of the works complained of.

That year was, undoubtedly, a most unfavorable one for cultivation everywhere owing to the diminished rain-fall, and I believe that the decrease of cultivation may well be attributed to causes over which the defendants had no control.

The result of the case is that a decree is passed declaring that the plaintiffs are entitled to the rights claimed in the plaint and directing the removal of the tunnel and so much of the bank complained of as is marked in the plan B to C. The plaintiff's claim for damages is dismissed. The proportionate costs incurred by plaintiffs will be borne by defendants 9-17.

The 1st defendant will bear his own costs."

The 1st defendant appealed in R. A. No. 126 of 1870, and the 9th, 10th and 11th defendants in R. A. No. 2 of 1871.

The Government Pleader and *Ananda Charlu* for the appellants, the 1st, 9th, 10th and 11th defendants.

Sanjiva Rau for the respondents, the plaintiffs.

The Court delivered the following judgments :—

HOLLOWAY, J.—In the present case the Civil Judge has decided, upon evidence of the existence of the state of things for a lengthened period, that the defendants are prohibited from draining their own land of the water falling upon it and naturally accumulating there.

There is no pretence of a contract. The two documents of 1815 are a statement, in answer apparently to an enquiry of some public officer, as to the manner in which the water was at that time accustomed to flow. That the vague statement, that they were willing that it should continue, made to another person, will not create an obligation, requires no lengthened statement, and accordingly the claim was put in the Court below upon prescription, and these documents produced as evidence of user long continued.

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There are certain principles of the Roman law on this matter at the basis of all the English cases which it may be useful shortly to state. Even as to water flowing from a spring in a definite course the *ius aquae* cannot be acquired by the continuance of such flow for any length of time. '*Solus aquae decursus per se nullam praescriptionem inducit.*' The passage of the code quoted in Gale *on Easements* (237 n. b.) was probably the foundation of Lord Ellenborough's decision (1 Camp: 463), and that decision is only one among many instances of the extreme danger of applying texts torn from their context. It is explained by Savigny, IV. 110. It presupposes an existent *ius aquae.* (See also Holtzschuher, II. 110). In Dig: III. 1. 21, Ulpian puts the question whether, as an action lies if I am hurt by the artificially increased flow of rain water, an action *e contrario* will lie if it is artificially cut off when it is my interest that it should continue, and Labes and Ofilius say no, for the action lies *si aqua pluvia noceat non si non prosit.* In Section 22 of the same title he shows that the upper proprietor has a right to remove a structure by which the natural flow was restrained, and because naturally there was a right that it should flow. *Chasemore* v. *Richards,* (7. H. L. 349,) overruling a batch of cases, emphasizes the necessity of a definite surface flow. The doubts of the dissenting judge were merely as to the extraordinary use made of the water, and it is a disputed point of law how far the use of flowing water may be carried where the landowner below is entitled to its continued flow. According to the decision of the majority the question did not arise, because the water was regarded as *extra commercium.* It is abundantly clear that the right here claimed could not in any system of law be acquired by prescription. I carefully avoid discussing the extent of the right of use which the upper proprietors would have had, even if there had been a definite stream of which they had not for a long course of years availed themselves. It must by no means be assumed, however, that the plaintiffs would then have been entitled to prevent the reasonable use of the stream for agricultural purposes. (See Cod. Civ. 641 & 642. Sax. Cod. 355 & 356). It is sufficient to say in this case that the object upon which the right is

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claimed is not one fitted for the arising of a right. I carefully abstain from saying more. I trust that both decision and legislation will deal very carefully with this most important matter. There is none which needs a more careful recurrence to principles both jural and economical, based upon a most careful consideration of the special circumstances of the country to which they are to be applied. We are in accord both with Roman and English law, and with legal principle higher than either, in determining that there is no object here over which a right can be acquired.

The decree must be reversed, and with costs.

INNES, J.—The tank used for the irrigation of the village in which the plaintiffs hold their lands is supplied in part by rain water falling on the lands of the village occupied by defendants 9 to 17, and the bund of the tank used formerly to throw back the waters so flowing into the tank on to the lands of defendants, where it remained till gradually drawn off into the area of the tank. Defendants 9 to 17, through the agency of the Government, relieved themselves of this inconvenience by making a work for draining off the water so periodically thrown back upon their land. A channel has been also constructed for conducting a supply of water to plaintiffs' tank. The plaintiffs, however, claim to have the former state of things restored, on the ground that they have a prescriptive right to throw back the water on to defendants' lands, and to keep it there till required for use.

It was contended for defendants in the Court below that the plaintiffs had suffered no diminution of water by the changes made, and that they were not entitled to claim an easement to retain on the lands of the defendants water so collecting upon it.

The Civil Judge decided that plaintiffs were entitled to the right claimed, which they had enjoyed for a long period prior to the alterations of which they complained.

In appeal the case came on first before the late Chief Justice and myself, and it was contended by Mr. Handley, for appellants, that plaintiffs could have no right of easement

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of keeping on other people's lands surface water not flowing in a defined stream. Sanjiva Rau, for plaintiffs, said that the Avalur tank, when full, spread over 30 kánis of the village of Sidhanti. That the Sidhanti villagers could not cultivate them till the water went down, and that, practically, the plaintiffs claimed this land for part of the year as part of their tank. Mr. Handley also contended that the plaintiffs were not in a position to claim the easement, as they were all ryotwári tenants under Government, with whom rested the right to control the arrangements for the supply of water to their ryotwári villages.

When the case finally came to be heard before Mr. Justice Holloway and myself, it was not thought necessary to hear Mr. Handley again. Sanjiva Rau acknowledged that he could not contend for a right to prescribe for rain water falling on the defendants' ground and not flowing in a defined channel. He relied on the undisputed document A, dated in the year 1815. This document, he contended, showed that the right claimed was submitted to at a very early date and was evidence of the consent of those interested in getting rid of it, to its continuance, as they had not then or since objected to it, until the circumstances occurred which gave rise to this suit. The document A is merely a report made by an official to the Collector, founded on the statements of the villagers, of the practice obtaining in the two villages in regard to this water. It is no evidence of a valid contract, and cannot in any way bind the defendants to continue to submit to the periodical submergence of their land for the advantage of plaintiffs. With respect to the other points— Water not running in a defined stream is the absolute property of the owner of the land of which it forms part, and before it has reached a defined stream he may drain it off or put it to what purpose he pleases. *Rawstron* v. *Taylor*, (25 L. J. Ex. 33,) and *Broadbent* v. *Ramsbotham*, (25 L. J. Ex. 115.) So that it is quite competent to the landholders of Sidhanti village, as representatives of their common landlord, the Government, to drain off or otherwise dispose of this water so soon as it lodges on the land. Again, a prescriptive right to throw back water and keep it standing on the

land of another exists only in the case of water flowing in a defined stream, and cannot apply to surface water not flowing in such a stream, though it might ultimately, if not arrested, flow into a tank.

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As to the rights of landholders in the position of plaintiffs against the Government in a matter of this kind, they have been discussed in the judgments in a recent case, *R. A.* 26 *of* 1871, in which I took part, and it is unnecessary to say more upon this point in the present case, as there is no evidence of any decrease of water by the new arrangements, and as, independently of the relation of the plaintiffs to the Government, the water flow is not of a nature to give a right to an easement. The judgment of the Civil Judge must be reversed. *Appeal allowed.*

Appellate Jurisdiction. (a)

Regular Appeal No. 56 *of* 1871.

DURVASULA GANGADHARUDU..................*Appellant.*

DURVASULA NARASAMMAH and 2 others...*Respondents.*

Upon the question whether the professional earnings of a Vakíl were generally his self-acquisition and impartible.—*Held*, by KINDERSLEY, J., that the question must be upon the facts in each case, how far the common family means were instrumental in enabling the professional man to earn the property which is claimed as subject to partition. The fair presumption is that such attainments as are usually possessed by a Vakíl have been acquired with the assistance of the family means.

By HOLLOWAY, J., that the ordinary gains of science by one who has received a family maintenance are certainly partible. Moreover, within the meaning of the authorities, a Vakíl's business is not matter of science at all.

THIS was a Regular Appeal against the decision of F. C. Carr, the Acting Civil Judge of Vizagapatam, in Original Suit No. 22 of 1869.

1872. *January* 30. *R. A. No.* 56 *of* 1871.

The plaintiff, the undivided brother of the late husband of the 1st defendant, sued to recover a sum of Rupees 820-6-9 and Rupees 517-9-8, interest thereon, being half share of the amount collected by the 1st defendant under a certificate of heirship granted to her by the Civil Court. The husband of the 1st defendant had been a Vakíl, and the question arose whether property acquired by him by his

(a) Present :—Holloway and Kindersley, JJ.

1872. January 30. R. A. No. 56 of 1871.

exertions as a Vakíl was divisible. The following is the judgment of the Civil Judge upon the point.—

"The next point to be considered is whether the other sum of Rupees 1,566-15-0 was part of the self-acquired property of Latsanna or not.

[Having considered at some length the evidence offered upon this point, the Civil Judge continued]

"It is unnecessary to go further into this matter: the above is quite sufficient to prove that the money was due to Latsanna for matters connected with his profession as a Vakíl. It is perfectly immaterial that some of the money passed through or was even raised by D. J. Subráyudu, the younger brother, who is no party to this suit, and who was acting in the matter, not as Latsanna's brother, but as the múktiár of Chinnam A'yyappa. The plaintiff has entirely failed to show that the money is in any way connected with family matters, or is anything except a professional transaction on the part of Latsanna.

It now only remains to consider whether, this being a debt due to Latsanna as a Vakíl, his undivided brother, the plaintiff, has any right to share it.

This is a point of Hindu Law upon which there has not been any authoritative ruling in the Courts.......... ....

That necessity, however, is forced upon me in the present instance, and after perusing all the authorities quoted in the case above referred to (*a*), I am of opinion that in the present case the earnings of Latsanna as a Vakíl are to be considered unimpartible. It is easy to find isolated texts of Hindu Law, which will support either view :—As on the one side the quotation from Nárada at page 66 of the above Volume laying down the broad principle that "wealth gained by valour, property received with a wife, and *the gains of science*, these three are indivisible"—and on the other the quotation at page 68, taken from an opinion upon a suppositious case, that "according to Hindu Law any property acquired by an unseparated brother by means of science, which science he was unable to obtain by assistance from his father's

(*a*) *R. A. No.* 73 *of* 1863, 2 M. H. C. R. 56.

funds, will be participated by his brothers."—The principles, however, of Hindu Law which governed that case do not seem to necessitate this case following the same rule ; there the matters in dispute were the clothes and jewels of a dancing girl ; the plaintiff was shown to have adopted and trained up the defendant from infancy, expended money upon her education in singing and dancing, and started her in public life decked out in clothes and jewels which must necessarily have been her own. It might well be contended that under such circumstances the defendant was bound to share with the plaintiff, as head of their so-called family, the additions which were made by the individual exertions of the defendant to the stock in trade. Similarly it might well be argued that, following out these same principles, a member of an undivided Hindu family specially trained by the head of the family in some special manner, started in a scientific profession by the same means, and, for a time at all events, trusting for support to the family means, and leaving his wife and children to be maintained in the family house while he was pursuing his at first unremunerative profession, might be called upon to place in the general stock any income he might eventually derive from that profession.

But, in the present instance, it may be presumed from the proceedings in this suit and in Original Suit No. 8 of 1864 that Latsanna received nothing further than an ordinary general education from his parents; that he was not indebted in any other way to the family means for his position, but on the contrary that by his management of the family affairs he had been able in reality to increase the common stock, and had in no way been a burden upon it. It cannot, in any way, here be said that here are the ordinary gains of learning and science which have been gained at the expense of the family. Under these circumstances, I do not think that the rest of the family have any right to declare that the professional earnings of Latsanna are divisible among the undivided members of his family."

The suit was, accordingly, dismissed with costs.

The plaintiff appealed on the ground that he had a right to sue for the money in question.

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of 1871.

Sloan for the appellant, the plaintiff.

J. H. S. Branson for the respondents, the defendants.

The Court delivered the following judgments :—

KINDERSLEY, J.—When this appeal came on for hearing I was inclined to accede to the proposition that the professional earnings of a Vakíl were generally his self-acquisition, not liable to partition among his coparceners. There is a natural inclination in favor of such an interpretation of the law as would secure the fruits of a man's professional earnings for his own branch of the family. But it is impossible to read the authorities without concluding that the question must be upon the facts in each case, how far the common family means were instrumental in enabling the professional man to earn the property which is claimed as subject to partition.

It has been found that the deceased received from his father nothing more than a general education. It does not appear that he was distinguished by his professional learning; and it would be difficult to presume that a Vakíl would probably be possessed of much learning or skill.

The fair presumption would be that such attainments as the Vakíl possessed had been acquired with the assistance of the family means, and this presumption does not seem to be rebutted in this case by evidence of the acquisition of such attainments without such assistance.

I am, therefore, of opinion that the professional earnings of the Vakíl in the present case would be subject to partition. But before finally disposing of the appeal, it will be necessary to require a finding upon the 4th and 6th issues recorded by the Civil Court.(*a*)

MR. JUSTICE HOLLOWAY :—I entertain no doubt that the fund is partible property, and I agree to the order pro-

(*a*) The 4th issue was whether, if plaintiff recovered the money claimed by him, he was proportionately responsible for the debts of the deceased Latsanna. The 6th issue was as to how much the widow had expended in paying the debts of her husband, her own maintenance and costs of legal proceedings.

posed. I fully adhere to the judgment of the High Court for which I am responsible (*b*), and especially to the statement that the ordinary gains of science by one who has received a family maintenance are certainly partible. I do not believe, moreover, that within the meaning of the authorities the Vakíl's business is matter of science at all. 1872. *January* 30 *R. A. No.* 56 *of* 1871.

(*b*) Reported at 2 M. H. C. R. 75.

Appellate Jurisdiction. (*a*)

Special Appeal No. 367 *of* 1870.

PERIYANA'YAGAM PILLAI............*Special Appellant.*
VI'RAPPA NAIKAN.....................*Special Respondent.*

Plaintiff sued for certain arrears of rent. The suit was dismissed as to Faslis 1271, 1272 and 1275 on the ground that no pattahs had been tendered for those Faslis. On Special Appeal it was contended that no tender was necessary, because a suit which had been brought before Fasli 1271 for the determination of the proper rate of rent was pending during those Faslis. *Held*, that the pendency of that suit did not render the tender of pattahs unnecessary, and that the present suit was rightly dismissed.

THIS was a Special Appeal against the decision of A. P. Srínivása, the Principal Sadr Amín of Tinnevelly, in Regular Appeal No. 223 of 1868, modifying the decree of the Court of the District Munsif of Srivaikuntam in Original Suit No. 934 of 1866. 1872. *February* 3. *S. A. No.* 367 *of* 1870.

The suit was brought by the Dharmakarta of the temple at Raméswaram to recover arrears of rent due by defendant for certain land held by him as a tenant of that institution. The arrear claimed was for faslis 1265 to 1272, and for 1275. The defence was that the claim was barred by the Act of Limitation, and that, under Section 7, Madras Act VIII of 1865, the plaintiff could not come into Court without tendering such a pattah as the defendant was bound to accept.

The Court of First Instance pronounced no opinion on the second plea, but found on the first that plaintiff's demand for Faslis 1265 to 1270 was barred, and decreed to him rent for Faslis 1271, 1272 and 1275. The plaintiff appealed against this decision, and the defendant, under Section 348 of

(*a*) Present :—Innes and Kindersley, JJ.

1872. February 3. S. A. No. 367 of 1870.

the Civil Procedure Code, objected to so much of the decision as went against him. The Principal Sadr Amín considered that the non-tender of such a pattah as the defendant was bound to accept precluded the plaintiff from bringing the suit. He therefore, in modification of the Munsif's decree, dismissed the suit.

The plaintiff preferred a special appeal on the ground that

No tender of pattahs was necessary for Faslis 1271, 1272 and 1275, because a suit which had been brought before Fasli 1271 for the determination of the proper rate of rent was pending during that period.

Sanjiva Rau for the special appellant, the plaintiff.

Scharlieb for the special respondent, the defendant.

The Court delivered the following judgments:—

INNES, J.—The question for decision in this special appeal is whether the pendency of the litigation between the parties during faslis 1271, 1272 and 1275, rendered the tender of pattahs unnecessary to entitle plaintiff to sue for the rent in arrears for those faslis.

I am of opinion that it did not. The suit then pending was instituted for the purpose of ascertaining the proper rate of rent which should have been entered in pattahs for prior faslis. But there was nothing to prevent plaintiff from tendering a pattah for what he considered the proper rate. The provisions of the law applying to this case (Regulation V of 1822, Section 9) are positive in requiring that such a suit shall be dismissed with costs, unless it be shown that a pattah has been tendered and refused, or that both parties had agreed to dispense with the use of pattah and muchalka. It is not contended that either of these conditions was complied with expressly, but it is said that the suit was tantamount to a continuing tender of pattah, or, in other words, that the tenant was bound to presume, from the pendency of the suit, that a yearly tenancy on the same terms was during that period regularly offered at the close

of each fasli. If the Act had intended this, I think it would have clearly said so. I think the decisions of the Courts below are right, and I would dismiss the special appeal with costs.

1872. February 3. S. A. No. 367 of 1870.

KINDERSLEY, J.—I am of the same opinion.

Appellate Jurisdiction. (a)

Special Appeals Nos. 377, 378, 379, 380, 381 *and* 387 *of* 1871.

NA'GAYASA'MI KA'MAYA NAIK, Zamindár of Saptúr.................. *Special Appellant.*

PANDYA TE'VAR......... *Special Respondent in No.* 377.

PALANIYANDI KONE ... *Special Respondent in No.* 378.

MUTTU KONE... ... ... *Special Respondent in No.* 379.

ERULAPPA KONE ...... *Special Respondent in No.* 380.

RANGANA'DA TE'VAR... *Special Respondent in No.* 381.

YIRA'MASA'MI KONE ... *Special Respondent in No.* 387.

Plaintiffs sued, under Sec. 12 of Madras Act VIII of 1865, to be reinstated in the possession of certain lands from which they alleged they had been wrongfully ejected by the defendant, a Zamindár. Defendant pleaded that the suit was not maintainable as the lands in question formed part of his "pannai" lands, and were not a part of his zamindárí. *Held*, that the suit was maintainable before the Revenue authorities under Section 12, Madras Act VIII of 1865.

THESE were special appeals against the decision of J. D. Goldingham, the Civil Judge of Madura, in Regular Appeals Nos. 119, 111, 110, 109, 112 and 113 of 1870, reversing the decisions of the Deputy Collector of Madura in Original Suits Nos. 88, 86, 85, 84, 89 and 90 of 1869 respectively.

1872. February 5. S. A. Nos. 377, 378, 379, 380, 381 and 387 of 1871.

The plaintiffs sued, under Section 12 of Act VIII of 1865, for re-instatement in certain lands which they had been ejected from by the defendant, and to recover damages, alleging that the lands belonged to them (plaintiffs) hereditarily; that varam had been paid to the Zamindár on account of the said lands according to the custom obtaining in the said

(a) Present :—Holloway and Kindersley, JJ.

1872. February 5. S. A. Nos. 377, 378, 379, 380, 381 and 387 of 1871.

zamindárí, and that pattahs had been issued in plaintiffs' names for the said lands when the zamindárí was under the management of the Court of Wards; and that in November 1869, the lands were forcibly taken possession of by the Zamindár. Hence these suits.

The defendant stated that the lands in litigation formed portion of the pannai attached to the zamindárí; that the suits were not sustainable under Section 12, Act VIII of 1865; that the lands were cultivated by plaintiffs when the zamindárí was under the management of the Court of Wards, and that they have been in defendant's uninterrupted enjoyment since 1277 when the zamindárí was restored to him, and that these suits were therefore barred.

The Deputy Collector found that the disputed lands formed a portion of the defendant's pannai, and that he had been holding the land in the capacity of a tenant, while the plaintiffs cultivated the same as his sub-tenants, and that there was no specific provision in the Rent Recovery Act for the adjudication of disputes relating to the forcible dispossession of lands between tenants and their sub-tenants, and with this view of the case non-suited the plaintiff in each case and directed each party to bear his own costs.

Against the said decrees the several plaintiffs appealed.

The Civil Judge delivered one judgment in all the cases, from which the following is taken.—

" This suit was instituted by plaintiff before the Deputy Collector, under Section 12 of the Rent Recovery Act, in order to be re-instated in his lands from which he had been ejected by the defendant without due authority, and for damages. The defendant, who is the Zamindár of Saptúr, pleaded, 1st, that the plaintiff voluntarily relinquished his land, and, 2ndly, that the Collector had no power of interference, as the lands in dispute were his own pannai cultivation. This view has been adopted by the Court below, but I doubt whether the decision is sustainable.

As observed in the original judgment, two questions arise in the case; one of fact, and the other of law. Of fact, namely, whether the plaintiff was unlawfully ejected from the land in November 1869, or whether he voluntarily

1872. *February 5.* *S. A. Nos.* 377, 378, 379, 380, 381 *and* 387 *of* 1871.

relinquished it in Fasli 1277 (A D 1867), and of law, namely, whether on the defence set up, the Collector has no jurisdiction. As the Lower Court has dismissed the suit entirely on the latter ground, it is necessary to proceed first to the determination of the question of fact involved in the first issue. [The Civil Judge then examined the evidence upon this point and continued]

I can only then come to the conclusion that defendant's story is false, invented to bar the remedy, and that, as a matter of fact, plaintiff was ejected from his lands in November 1869, as pleaded.

This being so, I have next to consider whether the Collector has power under Section 12 to adjudicate upon this matter. The Deputy Collector has found, and the defendant's Vakíl contends, that as the lands are the Zamindár's "pannai" lands, the case is taken out of his jurisdiction. First of all, in my opinion, this is begging the whole question; for, in deciding this point, which I must observe is not conceded by plaintiff, the Lower Court has exercised a jurisdiction which does not properly belong to it, and it has pronounced upon the very question of right which is reserved exclusively for the decision of the ordinary Civil tribunals. Secondly, assuming for the purposes of this argument that plaintiff's land is the Zamindár's pannai, what difference does it make in their respective possessions. To supply an answer to this question, I must first state what "pannai" lands are—they are lands to which the proprietor has an exclusive right, that is to say, the right to receive the Kudivâram produce, and the right to receive the mélwaram: lands regarding which landholders can arrange their own terms of rent as they can with respect to the waste or unoccupied lands alluded to in para. 4 of the preceding Section. Sometimes these lands are cultivated under the Zamindár's own ploughs, and sometimes they are let out for cultivation by others.

Mr. Scott for defendant contends that it is hard if the Zamindár cannot do what he likes with his own pannais,—the answer to which is, that so he can, provided he does it legally. Owners of other property, houses for instance,

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cannot forcibly eject their tenants for not paying rent, or for other causes, any more than owners of land. If they won't quit, resort must be had to legal measures, and it has been especially provided in Section 15 of the Limitation Act, as a remedy against such aggressive acts, that persons unlawfully dispossessed of immovable property may recover possession within six months, notwithstanding any title which may be set up by their opponents.

The next argument, and that upon which the judgment of the Lower Court has proceeded, is, that the Zamindár in respect of his pannai lands is not the Zamindár but his own tenant, and the actual cultivator is his sub-tenant, and that the Act makes no provision for a relationship of this description. I am not, however, prepared to adopt this proposition, as the Legislature has not thought proper to draw such a fanciful distinction in the enumeration of persons, whether proprietors or tenants, who are entitled to come in under this enactment. Turning to Section 12, the words of which I quote, I find that it is enacted that "the landholders specified in Section 3, (in which are included farmers of land from the proprietors) are not empowered to eject tenants from their lands, except by a decree of a Civil Court, or under the provisions of Sections 10 and 41 of this Act. Tenants ejected without such due authority may bring a summary suit before the Collector to obtain re-instatement with damages." Now, it is impossible to say that defendant is not for the purposes of this suit a landholder within the meaning of this Section, seeing that he is the admitted proprietor of the piece of land in dispute, whether his interest in it extends to one varam or to both, or that plaintiff is not a tenant, seeing that a tenant is defined in Section 1 to be any person who is bound to pay rent to the landholder, and hence it is that it is clear to me that the Collector is not without jurisdiction.

With regard to the relief sought for, I think it should be granted. The amount of damages claimed has not been contested, and it is not pretended that the provisions of Sections 10 and 41 have been resorted to. The result

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therefore, is, that the decree of the Lower Court must be reversed with all costs, and it is ordered that defendant do re-instate plaintiff in his lands and pay the damages sued for; the same as well as the costs to bear interest at 1 per cent per mensem till collection."

The defendant preferred a special appeal in each case on the ground that the plaintiff was not entitled to maintain the suit under Section 12, Madras Act VIII of 1865.

O'Sullivan for the special appellant, the defendant.

Handley for the special respondents, the plaintiffs.

The Court delivered the following judgments:—

KINDERSLEY, J.—These were suits under Section 12 of Madras Act VIII of 1865 for re-instatement in the possession of lands from which the plaintiffs alleged that they had been wrongfully ejected by the defendant, the Zamindár. The defendant pleaded that the land in question was his own pannai land not forming part of his zamindárí, and that, therefore, the suits were not sustainable before the Revenue authorities under Section 12 of Madras Act VIII of 1865.

It is argued that that Section relates only to cases of ejectment by landholders of the classes specified in Section 3, and that, in respect of his pannai land, the defendant was not a Zamindár. I understand that the Zamindár's pannai lands are not included in his zamindári, but are an adjunct to it. The Judge says that they are lands to which the proprietor has an exclusive right, a right to the kudivaram and to the mélvaram. This is certainly something more than the tenure of an ordinary ryot, who is not entitled to the mélvaram. And it appears to me from this and other cases which I have met with in this Court, that we cannot say that the defendant would have held these pannai lands if he had not been the Zamindár. In respect of his own zamindárí he certainly is a Zamindár, and it has not been shown that he loses that character when he deals with his pannai land. I am, therefore, of opinion that the objection to the suits under Section 12 cannot be sustained.

No issue having been raised as to the amount, if any, due to the plaintiffs on account of damages, it will be necessary to refer the matter to the Civil Judge for enquiry.

1872. *February* 5. *S. A. Nos.* 377, 378, 379, 380, 381 *and* 387 *of* 1871.

HOLLOWAY, J.—It would be at least a subtlety to say that these lands are not let by the Zamindár as zamindárí. It seems to me that there is no ground for so saying. The mere incident that the land is not originally in the hands of tenants will no more prevent the lessee, when it is let, from being a tenant of the Zamindár, whose interests are provided for by the Act, than the incident that the land let was previously zamindárí waste would do. I agree in the above judgment.

Appellate Jurisdiction. (a)

Criminal Regular Appeal No. 361 *of* 1871.

B. KRISTNA RAU.........*Appellant* (*Prisoner*).

Upon the construction of Section 167 of the Criminal Procedure Code, *Held*, that the Section by implication vests in the Court or authority to whom the Judge or other public servant not removeable, &c., is subordinate, the power of sanctioning or directing such prosecution. It does not say that the Government must give the power, but that it shall exist unless limited or reserved. Every Court or authority, therefore, has it unless there is a limitation. It is very desirable that such sanction or direction should be in writing and attached to the record, but it is by no means legally imperative.

Semble, the objection (to the want of sanction) should be taken at the trial.

1872. *February* 7. *C. R. A. No.* 361 *of* 1871.

THIS was an appeal against the sentence of L. Forbes, the Acting Session Judge of Bellary, in Case No. 110 of the Calendar for 1871.

The prisoner was convicted for that he, being a public servant, to wit a Sub-Magistrate, had received a gratification other than legal remuneration, and had thereby committed an offence punishable under Section 161 of the Penal Code. On appeal it was objected that the conviction was bad, inasmuch as no such sanction to prosecute, as was required by Section 167 of the Criminal Procedure Code, had been given. It appeared that the Head Assistant Magistrate, who was competent to sanction the prosecution, had given no formal written sanction to prosecute, but that he had taken up the case himself, put it upon his file, and, after investigation, committed the prisoner to the Session Court.

Johnstone for the appellant, the prisoner.

The following judgment was delivered by

HOLLOWAY, J.:—I will put in writing a short note of the construction put upon Section 167.

(a) Present :—Holloway and Kindersley, JJ.

1872. February 7. C. R. A. No. 361 of 1871.

The Section by implication vests in the Court or authority to whom the Judge or other public servant not removeable, &c., is subordinate, the power of sanctioning or directing such prosecution. It does not say that the Government must give the power, but that it shall exist unless limited or reserved.

Every Court or authority, therefore, has it unless there is a limitation. The inappropriateness of the word 'reserve in this connection does not interfere with the obvious construction.

There is no provision that the sanction must be in writing, and the question of the sufficiency does not really arise in this case, for there is no error upon the record. It is, no doubt, very desirable that such sanction or direction should be put in writing and attached to the record, but it is by no means legally imperative.

If the question had arisen and it had appeared, as the fact is, that the prosecution was conducted before the very authority to whom the Sub-Magistrate was immediately subordinate, we should probably have had no difficulty in determining that there were both sanction and direction.

It has been erroneously supposed that a decision in a case from Calicut is to the contrary. There a speculative petition was put in, and the Counsel was told that as he was not prepared to say that there was sanction, it was unnecessary to express any opinion.

If there had not been sanction, it does not follow that the objection could have availed the prisoner after trial and decision.

The objection is not (as it was in a case from Mangalore) one going to the root of the Court's jurisdiction, but something (like notice of action in certain Civil cases) needed to justify a Court in going on, and preventing it from going on if the objection is taken. There are objections which prevail *ipso iure*, others *ope exceptionis*. Moreover, there are many objections which can be of avail only if taken in due time. In a celebrated case (*Reg.* v. *Frost*, 9 C. & P. 129-187) this distinction came out very prominently.

KINDERSLEY, J.—I agree.

Appellate Jurisdiction. (a)

Regular Appeal No. 26 *of* 1871.

KRISTNA A'YYAN and 5 others.................*Appellants.*

VENCATA'CHELLA MUDALI and 2 others.........*Respondents.*

The plaintiffs, as shareholders in and heads of the villages of Ariyúr and Kuvirikudi, sued for an injunction directing the defendants to close an irrigation channel which was opened in 1869 and to remove the sluice. It appeared that a channel called Kaduvai had, by means of a branch, for very many years supplied the plaintiffs' village with water. The village of Partical, of which the 1st defendant was mírásídár, up to the date of the opening of the new channel had received its supply from the Mallattar channel. The supply from this was insufficient and the 2nd defendant, the Superintending Engineer (representing Government) designed a new channel from the Kaduvai to supplement the deficiency of the Mallattar. The water of the Kaduvai was diverted into the new channel at a point above the point of divergence of the branch channel from the Kaduvai to the plaintiffs' village. The relief was prayed for in the Court of First Instance on the ground that the supply by the Kaduvai had never been sufficient for the wants of the village, and that the new channel must necessarily cause a still further deficiency. The Civil Judge found that the plaintiffs had sustained no loss by the opening of the new channel, and dismissed the suit. On appeal it was contended 1st, That plaintiffs had an absolute right to the uninterrupted flow of all the water in the Kaduvai channel without subtraction or diminution by the defendants or by the Government, represented by the 2nd defendant, and that any diminution, though not causing loss, was an invasion of their rights. 2nd, That if they had not such absolute right, they had a right to a supply of water for the necessary purposes of irrigation and otherwise for their village, and that the possibility of loss at some future time, arising from a possible wrongful diminution of the water to their detriment through the new sluice and channel, entitled them to the relief claimed.

Upon the first point *Held,*—That the plaintiffs had not the extensive and exclusive right to the water contended for by them, but that their right was limited to the beneficial enjoyment of the water for the irrigation and other necessary purposes of their tenancies as heretofore enjoyed. Also that the Government, as proprietor of the Kaduvai channel and water in it, had, subject to the above limited use by the plaintiffs' and other villages in the same position as the plaintiffs', a right to distribute the water of the Kaduvai channel for the benefit of the public.

Upon the second point *Held,*—That no ground existed for granting an injunction, as no right of the plaintiffs had been invaded, no damage had accrued, and no case of prospective damage had been made out.

Ponnusámi Tévar v. *The Collector of Madura,* 5 M. H. C. R. 6, distinguished.

1872. *February* 9. *R. A. No.* 26 *of* 1871.

THIS was a Regular Appeal against the decision of J. R. Daniel, the Acting Civil Judge of Trichinopoly, in Original Suit No. 21 of 1869.

The suit was brought to obtain an injunction to close a new channel made by the Superintending Engineer, the second defendant, for the supply of water to the village of the 1st defendant.

(a) Present :—Innes and Kernan, JJ.

1872. February 9. R. A. No. 26 of 1871.

It was alleged in the plaint that the village of Ariyúr, the plaintiffs' village, had always received its supply of water from a channel called the "Kaduvai;" that from this the supply of water had hitherto been deficient; that the village of Partical (1st defendant's village) had hitherto been supplied by a channel called the Malattar; but that in February 1869, the 1st defendant, by the direction of the 2nd defendant, opened a new channel to supply his village from the left bank of their (plaintiffs') channel, and thereby diminished the supply of water to plaintiffs' village.

The 1st defendant answered that the supply of water to his village of Partical by the old channel was insufficient; that as the water which ought to flow into his village, flowed into the Kaduvai and then was wasted, the 2nd defendant and the Collector sanctioned the opening of the new channel in order that he might be benefited by the water thus running to waste; that the new channel took its head from the junction of the Kaduvai and Malattar channels; that channels supplying three other villages besides the plaintiffs' took their rise from the same place, and the ryots of those three villages made no complaints, so that the plaintiffs' objection was made out of mere enmity.

The 2nd defendant answered in effect that the plaintiffs had sustained no damage by the change made in the mode of supplying their lands with water; that the supply of water to the Kaduvai was greatly increased by the Government building the upper anicut in Káveri, and transferring the head of the A'yyan channel, which supplies the Kaduvai, from its former position 10 miles below the anicut to its present position above it, and therefore the Government had the right to regulate the water as they thought fit.

That as part of the lands in Ariyúr were on a high level, and in a time of scarcity might be deprived of water by the new channel to Partical, regulating sluices had been made by which the supply of water to the different villages could be regulated according to their wants.

The following issues were framed,—

1st. Whether the plaintiffs have, by the work complained of, sustained loss, and if so, what amount of loss.

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2nd. Whether the Kaduvai receives an increased supply of water in consequence of the removal of the head of the A'yyan channel to the upper anicut.

The following is taken from the judgment of the Civil Judge.—" The new channel has been only used one year, and the oral evidence does not establish that any actual loss has been as yet sustained by the plaintiffs' village; it shows, however, that for several years previous the water supply to the villages by the three old channels has not been over-abundant; there has been a deficiency; the 2nd crop of this year has not been cut, and it is therefore impossible to say whether any loss has been sustained; none has been sustained in the 1st crop; there has been a plentiful supply of rain this year, and no actual injury has as yet been sustained by the plaintiffs.

Although no actual damage is proved to have been caused to the plaintiffs by the new channel, it remains to be considered whether substantial injury must follow as a natural consequence, for in that case the plaintiffs would be entitled to their remedy.

It does not appear that the discontinuance of the old Partical channel causes any increase in the supply of water to the Kaduvai at the dam H; but there is undoubtedly a waste of water at the dam H, even from its present supply, and assuming that the plaintiffs have a right to the flow of water through their channel, they can have no right to object to the Officers of Government diverting the water from the main channel of the Kaduvai, unless it be shown that their supply is thereby diminished. It is shown that hitherto water has gone to waste over the dam H, and it has not been shown that the plaintiffs' channel has suffered by the new channel. The plaintiffs might suffer if in time of scarcity the new channel were to be supplied equally with those formerly existing; the 2nd defendant, the Superintending Engineer, has assured the plaintiffs that arrangements will be made to regulate the sluices so as to prevent injury to the plaintiffs, and I do not think that the possibility of such an arrangement failing can be made the ground for granting the perpetual injunction asked for by the plaintiffs." The suit was dismissed with costs.

The plaintiffs appealed on the grounds.—That the opening of the new channel was an invasion of the plaintiffs' rights irrespective of any actual loss or substantial injury sustained by them, and that the plaintiffs were entitled to the relief sought for.

Miller and *Ráma Rau* for the appellants, the plaintiffs.

The *Government Pleader* for the respondents, the defendants.

The Court delivered the following judgments :—

INNES, J.—The relief sought for in this suit is an injunction directing the defendants to close an irrigation channel which was opened in 1869, and to remove the sluice.

The channel called Kaduvai branches off into channels for the supply of the village of Ariyúr (plaintiffs' village) and the villages of Kilambil and Sengarayúr respectively. The village of Partical, that of the 1st defendant, up to the date of the opening of the new channel had received its supply by the Mallattar channel. The supply from this was insufficient, and the Public Works Department designed the new channel from the Kaduvai to supplement the deficiency of the Mallattar. The water of the Kaduvai is diverted into the new channel at a point above the point of divergence of the branch channels from the Kaduvai to the several villages of Ariyúr, Kilambil and Sengarayúr. The relief was prayed for in the Court of First Instance on the ground that the supply by the Kaduvai has never been sufficient for the wants of the village, and that the new channel must necessarily cause a still further deficiency. The Civil Judge found that the plaintiffs had sustained no loss by the opening of the new channel and dismissed plaintiffs' suit. In appeal the point is taken that the opening of the new channel is an invasion of plaintiffs' right to the uninterrupted flow of water by the Kaduvai, and entitles the plaintiffs to the injunction prayed without proof of actual damage, and that, though no damage is proved to have yet resulted, the new channel must necessarily be detrimental to plaintiffs. The 2nd defendant, the Superintending Engineer (it is urged), while stating that the arrangements are that Partical is not to receive water by the new channel till Ariyúr has had its full

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supply, admits that the regulation of the supply to each village is entirely in the hands of the villagers. That 1st defendant can, therefore, at any time divert the water from the Kaduvai before the village of Ariyúr has had its full supply, and that the supply of water to Ariyúr is thus rendered precarious. What plaintiffs really claim, as was admitted at the hearing in appeal, is an easement to the uninterrupted flow of water by the artificial channel called the Kaduvai. The Government, the common landlord of plaintiffs and 1st defendant, alters the distribution of water in a manner which plaintiffs consider to be prejudicial to them; plaintiffs step in and claim a right to the continuance of the old mode of distribution. It is elementary law that an easement cannot be claimed in respect of a tenement but by the owner of that tenement, and plaintiffs are in no sense owners of the village lands, or of any portions of the village lands in respect of which they claim this right. The plaintiffs are tenants from year to year, and though custom or contract may practically attach to each several tenancy the incidents of a permanent holding, defeasible only for non-payment of the assessment which may from time to time be imposed, they have nothing approaching to an absolute estate in the land. Now, an easement implies an absolute outright grant to some person of an incorporeal right as appurtenant to his corporeal property. Such a grant cannot be conceived as made to a mere tenant in respect of a tenement in which his interest is precarious. A grant of this kind, therefore, cannot in such a case be implied, or in other words there can be no easement claimed by a tenant as against his landlord. But there is nothing in the nature of the plaintiffs' relations with the Government to prevent their possessing, as tenants, rights limited by the duration of their interest in the land. Such rights, however, must arise either by the express contract of letting, or by implication from that contract. The question, therefore, now presents itself whether the plaintiffs under their several contracts of letting can claim a right to prevent any diversion of the water of the Kaduvai channel for the use of the ryots of other villages. In letting irrigable land with existing conveniences for the supply of water for the purposes of irrigation, the landlord, no doubt, impliedly engages, if nothing to the contrary is expressed, that the existing arrangements for

the supply of water will not be interfered with to the prejudice of the tenant during the continuance of the tenancy; and as the plaintiffs' tenancies are from year to year, it may be taken that this engagement is yearly renewed. But I do not think that anything beyond this can be implied from the nature of the tenancy. The case reported in 5 M. H. C. R. 6, which was quoted to us by the learned Counsel for the plaintiffs (appellants), has no analogy to this. That was a case in which the plaintiff was the proprietor of the tenement in respect of which he claimed the easement, and was therefore in a position to claim it, which the plaintiffs are not. That case, therefore, may be dismissed from consideration. Limiting plaintiffs' right to this, that they are entitled to demand in respect of their several tenancies that no new arrangement for the distribution of water shall be made to their prejudice during their tenancies; and applying this proposition to the admitted facts of the case; are the plaintiffs entitled to the relief prayed? The Government, whom the 2nd defendant represents, has the undoubted right to regulate the distribution of water supplied to its ryotwári villages. A great portion of the water flowing through the Kaduvai channel admittedly still runs to waste over the dam into the Coleroon at the point at which the old branch channels are led off to the plaintiffs' and other villages. It is clear that the utilising this surplus water, by turning it into a new channel, can work no breach of the contracts with plaintiffs. But, it is said, there is danger through the new channel of the proper supply to Ariyúr being diminished. To this the answer on the part of the Government is "our arrangements "are that the villages hitherto supplied from the Kaduvai "channel shall be first supplied and no water shall be diverted "to Partical by the new channel till those villages have re-"ceived their full supply." So far as appears, therefore, there is no reason for apprehending any breach of their contract on the part of the Government. In what they have done they have merely acted in accordance with their rights as landlord and with their duty as guardian of the interests of the community. It is true that the due working out of the arrangements for the use of the new channel depends upon the compliance of the village officers with the orders sent. This is so in all irrigated villages, and we cannot assume that the village

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officers will not do their duty, nor have we any right to assume as against 1st defendant, the Mírásidár tenant of Partical, that he will cause the water to be diverted before he is entitled to take it, or to such an extent as to diminish the due supply to plaintiffs' village. I think, therefore, that no case has been made out for granting an injunction either (as originally prayed) for the closing of the channel, or (as it is now contended plaintiffs are at least entitled to) for the restraining defendants from diminishing the supply to plaintiffs' village, or restraining the 1st defendant from diverting the water to his village until plaintiffs have had a full supply. The first would be to establish a right of easement in the plaintiffs which does not reside in them, and for injunctions in the nature of the two last no case of prospective damage has been made out upon the facts. Plaintiffs have their remedy in damages should damage occur. The appeal must be dismissed with costs.

KERNAN, J.—The plaintiffs in this case filed their plaint in the Civil Court of Trichinopoly stating the following facts, viz. :—That they are shareholders in and are the heads of the villages of Ariyúr and Kurivikudi containing 600 acres. That the first defendant is the sole Mírásidár of the village of Partical containing 100 acres. That plaintiffs' villages have been supplied with water by the Kaduvai channel, which not taking its rise in any river is a channel of surplus water ; that the defendant's village has been supplied with water by the Mallatar channel ; that plaintiffs' village is a high one and the water of Kaduvai does not freely flow and is quite dry in November and December ; that there is a deficiency every year in the supply of water ; that the defendant's village is a low one and is always fully supplied with water by the Mallatar ; that the 1st defendant, under an order of the 2nd defendant (representing Government), without plaintiffs' knowledge, opened a new channel to his village by making a head on the left bank of the Kaduvai and by building a sluice on the road 5 or 6 yards to the west of plaintiffs' sluice. Plaintiffs allege that if the channel should be opened, there shall be a great deficiency of supply of water to their villages and the lands shall be left waste.

Plaintiffs pray that the new channel may not be opened, and that the portion opened may be filled up and the sluice built removed.

The 1st defendant in his written statement alleges that the supply of water to his village Partical is only surplus water of a channel called the A'yyan channel; that the surplus water of that channel ought to flow into the Kaduvai and Mallatar channels, and thence to his village; that his village could not be fully supplied with water by the channel which has its head in the Mallatar, and that the water of the Kaduvai channel falls over into the Coleroon river, and is waste; that in order to utilise the water so going to waste, the 2nd defendant allowed the head and channel in dispute to be opened; that the Kaduvai can be supplied by water direct from the Coleroon. The 2nd defendant in his statement alleges that the Kaduvai receives not only the surplus water of the lands irrigated by the northern and southern channels, but that those two channels join the Kaduvai above the place where the plaintiffs' channel is made, and that the A'yyan channel has its head on the west of the upper anicut, and therefore that the Kaduvai cannot be considered one of surplus water; that the water flows over the dam of the Kaduvai where plaintiffs' channel is into the Coleroon, and is waste; that the Mallatar having a smaller supply than Kaduvai irrigates a larger quantity of land; that the Mallatar does not fully irrigate the land under its irrigation; that the Mallatar joins the Kaduvai on the west of the dam, where the Ariyúr (plaintiffs') channel rises, and that the village of Partical, lower down to the east, has a right to receive the water from that dam. That the head of the A'yyan channel has been transferred to the upper anicut, ten miles to the west of its former position, and the supply of water in the Kaduvai greatly increased. The 2nd defendant then claims that as such work was done solely by Government, Government has a right to distribute the water in the Zillah at their option, but that, at all events, Government has a right to distribute the water, so supplied, to the lands under irrigation of Kaduvai channel at their option for their own benefit and that of the several people. The 2nd defendant also states that as some of the Ariyúr lands are high, the supply of water at times of scarcity should be impeded by the Partical channel in dispute, and that it is objectionable to open a channel for Partical except with a sluice at the head; that by building such sluice the supply of water to the Partical channel may be regulated, according to

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the wants at different times, and the supply of water to those lands can be regulated at times when there may be no sufficient water to flow freely through the Kaduvai to the lands including plaintiffs'.

The following issues were framed.—

1. Whether by the work complained of the plaintiffs have sustained loss, and if so, to what amount?

2. Whether the Kaduvai channel receives an increased supply in consequence of the removal of the A'yyan channel to the upper anicut?

The 1st issue was found in the Court below in the negative and the 2nd issue in the affirmative. Upon the evidence the findings on these issues were correct. Plaintiffs did not establish that the supply of water heretofore used by or necessary for their villages was in any way diminished by the works complained of. At the outside the evidence of the plaintiffs only established the statement of the 2nd defendant that, in times of scarcity, the flow of water through the new channel might cause loss to plaintiffs, unless its flow was either prevented or regulated so as to supply plaintiffs' villages in the first instance with sufficient water. There was no evidence to sustain the allegation of the plaintiffs' lands being waste for want of water by reason of the works or acts complained of.

So far, therefore, as the case of the plaintiffs to relief was put upon the ground of actual loss sustained, it wholly failed. However, in the Court below and before us it was contended—

1st. That plaintiffs have an absolute right to the uninterrupted flow of all the water in the Kaduvai channel without subtraction or diminution by the defendants or by the Government, represented by the 2nd defendant, and that any diminution, though not causing loss, is an invasion of their rights.

2nd. That if they have not such absolute right, they have a right to a supply of water for the necessary purposes of irrigation and otherwise for their village, and that the possibility of loss at some future time arising from a possible wrongful

diminution of the water to their detriment through the new sluice and channel entitles them to the injunction and other relief claimed.

To deal with the first point.

This claim of absolute right can only be in the nature of an easement annexed to the possession of the village of plaintiffs, inasmuch as the Kaduvai channel is not situate on any lands owned or held by the plaintiffs, but is on the land of the Government. The plaintiffs and other villagers are tenants from year to year for their village to Government, with a right, it is assumed, of continuous occupation, paying rent which may vary from time to time. There is no evidence of any express contract that the plaintiffs, or those through whom they claim, should have a right to the uninterrupted, undiminished flow of all the water in the Kaduvai channel. The evidence only proves that plaintiffs' village has for very many years (since its establishment it may be presumed) received their supply of water for irrigation and all other necessary purposes from the Kaduvai channel, and it appears that two other villages are similarly circumstanced as plaintiffs' village, and have in the same way derived their supply of water from the Kaduvai channel, through channels made in the same dam. Upon the evidence the Government have openly and notoriously exercised rights of ownership over the Kaduvai channel and have largely increased the supply of water in it by transferring the head of the A'yyan channel, from which the Kaduvai branches, ten miles further to the west into the head of the upper anicut supplying both channels. Cotemporaneously with such transfer the dam in which the channels to villages are made was constructed. It is admitted that water flows at times over the dam into the Coleroon.

Upon this state of facts the plaintiffs, the *tenants* of Government for their village, claim, in respect of the village, the extensive right of easement above mentioned against their *landlord* upon the ground that long enjoyment of the use of the water is evidence of a grant, which may legally have been by parol, of such right. But such enjoyment, or user, cannot evidence or establish a right greater than the beneficial use made by the plaintiffs of the water. In *Williams* v. *Mor-*

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land (2 B. & C. 913) Bayley, J. says, "flowing water is originally *publici juris*. So soon as it is appropriated by an individual his right is co-extensive with the beneficial use to which he appropriates it." See also *Bayley* v. *Shaw* (6 East, 208) "any exclusive right is to be measured by its enjoyment," page 213, Graham B., which decision was upheld. See also other cases collected in Kerr *on Injunctions*, page 387. These were, however, cases of natural water-courses, but *Wood* v. *Waud*, 3 Ex. 777; *Sutclife* v. *Booth*, 32 L. J. Q. B. 136, show that the circumstances under which the artificial course was created may give rights similar to those of a riparian proprietor.

The circumstances of this case show that the water course was not made by the plaintiffs, or those through whom they derive, nor was the water of it used exclusively by them. The Kaduvai channel was, as it must be inferred from the evidence, made by the Government for the purpose of irrigating not only plaintiffs' lands but those of several other villages. We hold, therefore, that the plaintiffs have not the extensive and exclusive right to the water contended for by them, but that their right is limited to the beneficial enjoyment of the water for the irrigation and other necessary purposes of their tenancies as heretofore enjoyed. We also hold that the Government, as proprietor of the Kaduvai channel and water in it, has, subject to the above limited use by the plaintiffs' and other villages in the same position as the plaintiffs', a right to distribute the water of the Kaduvai channel for the benefit of the public. The case in 5 M. H. C. R. p. 6, does not apply, as the plaintiff in that case was the proprietor of several villages, and had acquired an absolute right to the flow of the water in the artificial water-course, undiminished, to his several villages, and had used and always asserted his right to use all the water in its ordinary flow. The circumstances of that case proved such absolute right; here they prove the contrary.

Upon the 2nd proposition above contended for.—We have not been referred to any principle of law or to any authority upon which it can be sustained. The proposition admits that plaintiffs have only a right to a supply of water for irrigation and other purposes of the village, and further admits that the plaintiffs have not been deprived of any portion of that supply

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but claim a right of action by reason of *possible* loss. No right, therefore, of the plaintiffs has been invaded, and no damage has been done to them. *Rochdale* v. *King* (14 Q. B. 122) is supposed to have been a case where, although no damage from the diversion of an artificial water-course was proved, the plaintiff succeeded, but Lord Denman giving judgment says that damage must have been done to the plaintiff. In *Williams* v. *Morland*, above cited, Littledale says "The doing of any act calculated to injure the right is a sufficient ground of action, but generally speaking there must be a temporal loss or damage;" again, he says, the "jury have found that plaintiff has not sustained damage, and therefore they have negatived the ground of action." In *Goldsmith* v. *Tunbridge Wells Commissioners*; L. R. 1 Ch. Ap. 354; Turner, L. J. says, "The interference of this Court in cases of prospective injury very much depends, as I apprehend, upon the nature and extent of the apprehended mischief, and upon the certainty or uncertainty of its arising or continuing," and he refers to a case *Elmhirst* v. *Spencer* (2 Mac. & G. 45) where a nuisance complained of was not established and no damage was proved, and the injunction such as here claimed was refused. These cases and that in 5 M. H. C. R. above alluded to, are instances of the general rule that a permanent injunction is only granted,—1st, when some established right has been invaded—and 2nd, when damage has accrued or must necessarily accrue from the act or omission complained of. In this case not only no right has been invaded and no damage has accrued, but the defendants disclaim all intention of injuring plaintiffs, and we see that every reasonable precaution has been taken to prevent any injury being done to plaintiffs, as the top of the sluice complained of is 13 inches higher than plaintiffs'; so that no water can be drawn off through it until plaintiffs have more than 13 inches of water, and even then, further provisions have been made to prevent any water being drawn off, except water which otherwise should go to waste, so that plaintiffs' and the other villages may be completely protected from loss.

We therefore think plaintiffs have wholly failed, and this appeal must be dismissed with costs.

Appellate Jurisdiction. (a)

Civil Miscellaneous Petition No. 56 *of* 1872.

C. D. Barracho......................*Petitioner.*

A. D. Souza and 14 others...... .....*Counter Petitioners.*

B. submitted to arbitration the matters in dispute between himself and the other parties to a suit, on the terms that an umpire should be selected from seven persons whom he named. Those terms were not objected to by the other side. Arbitrators were agreed upon, and R., one of the seven persons named in the submission, was appointed an umpire. But R. and some of the arbitrators declined to act. Fresh arbitrators were then chosen but no umpire; and, the arbitrators being equally divided in their opinion on the case, the Court of its own motion appointed as umpire L., who was not one of the seven persons named in the submission. B. objected to L's appointment, but the Judge overruled the objection and passed judgment in accordance with the umpire's award. *Held*, On Appeal, that as it was stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the Court to appoint an umpire, under Section 319 of the Civil Procedure Code, was controlled and limited by that stipulation; and that, the umpire not being one of the seven persons named in the submission, there was no valid award.

1872. *May* 13. *C. M. P. No.* 56 *of* 1872.

THIS was a Petition against the order of M. J. Walhouse, the Civil Judge of Mangalore, dated the 24th October 1871, passed on Mis. Petition No. 911 of 1870.

On the death of the Reverend E. A. Barracho, Priest of the church of Kulawar at Péjawar, his representative, Mr. C. D. Barracho, claimed certain property, moveable and immoveable, on the ground of its being the deceased priest's private property. Mr. A. D. Souza and others, Muktésars of the said Church, contended, on the other hand, that the whole of the property belonged to the church, and brought a suit in the Civil Court of Mangalore for its recovery. In reply to a proposal to refer the matter to arbitration, Mr. C. D. Barracho, defendant, presented a Petition (No. 144 of 1871) to the Civil Court on the 2nd March 1871, stating that he had no objection to the matter in difference being referred to arbitration, provided that it was agreed that an umpire should be selected out of the seven persons following.—(1.) Mr. L. S. Rosario, (2.) Mr. J. F. Fernandes, (3.) Mr. B. V. D'Rosario, (4.) Rev. D. Pereira, (5.) Rev. B. P. Miranda, (6.) Rev. B. Baretto, (7.) Rev. P. C. Luis, and praying that should the plaintiffs (Petitioners in Mis. Petition No. 911 of 1870) not agree to the above, the case might be settled

(a) Present :—Kernan and Kindersley, JJ.

1872. May 13. C. M. P. No. 56 of 1872.

by the Court and he be permitted to return to Goa on being examined. On the 4th March the Court made the following order.—"The matter being referred to arbitration with consent of both parties, the 4th, 5th and 6th out of the seven persons named in this Petition are agreed to and approved of as arbitrators on behalf of this Petitioner. Mr. L. S. Rosario is agreed to and approved of as umpire." On the 7th March Mr. Rosario wrote declining to act as arbitrator, and on the 31st of that month the Court made the further order :—"Mr. L. S. Rosario has declined to act as umpire, but that need form no obstacle to the arbitrators taking up the matter, as, by Section 316, should there be a majority, the decision will rest therewith, and there is no occasion to delay settlement in view of a contingency that may never arrive. The Court, therefore, directs the arbitration to proceed." These arbitrators, however, declined to act and on the 15th April 1871 the Court made the order :—" The arbitrators originally named having declined to serve, the Court, with consent of both parties, names on plaintiffs' side R. Norenha, Pasco Pai, John Siquera, and on defendant's side J. F. Fernandes, Rev. P. C. Luis, Rev. A Coelho, all the above named being willing to serve as arbitrators. The arbitration may be entered upon forthwith." On the 14th of June the Rev. P. C. Luis wrote declining to serve as an arbitrator and on the 6th July the Court ordered as follows:—"Pedro Cussodio Luis, the arbitrator for defendant, having declined to serve, the Court, on the application of defendant's Vakíl, directs Balúr Vastiva to be substituted in his place." Accordingly, the arbitrators proceeded to consider the matter in dispute but were unable to agree upon an award, being equally divided, and on the 26th September following the Court passed the order:—"The arbitrators named having been unable to agree on an award, and divided equally upon the matter submitted to them, the Court, under Section 319, resolves to appoint B. C. Leggatt, Esq., Treasury Deputy Collector, as umpire for final decision, and directs that all necessary accounts and documents be submitted to him." On the 28th September Mr. Barracho, through his Vakíl, presented Petition No. 494 of 1871 to the effect that Mr. Leggatt had been appointed umpire without the consent of the parties and without any provision having been made in

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the order to the arbitrators for the appointment of an umpire; that the appointment was thus opposed to Section 316 of the Code, and that the parties would not consent to the appointment. He therefore prayed that the appointment might be cancelled and the case decided by the Court. Upon this Petition the following order was passed:—"In this protracted affair great indisposition has been shown to allow matters to be put in a train that promised a settlement. Arbitrators and an umpire were named with consent of both parties, but declined to serve. At last, after much difficulty, arbitrators were agreed upon by both sides who undertook to serve. As there was so much difficulty in finding an umpire, the Court thought it best not to name one then, but to wait and learn whether the award of the arbitrators would decide the dispute. They have now decided equally, each side returning a different finding, and in consequence the Court resolves to exercise the power it reserved of appointing an umpire for final award. This course the Court considers best and in no wise contrary to law, and therefore dismisses this Petition."

On the 13th October 1871, Mr. Leggatt made his award declaring that the property in dispute belonged to the Church of Kulawar.

On the 24th October 1871, in accordance with the prayer of a Petition presented by the Muktésars of the Church, the following order was made by the Court :—" The umpire having returned his award, finding in favor of Petitioners, the Muktésars of the Péjawar Parish Church, and the Court entirely agreeing with that award, no application to set it aside moreover having been made, it is ordered that the documents and landed property referred to in this Petition be made over to petitioners in accordance with the umpire's award. One fourth costs also allowed them."

Against this order of the Civil Court, Mr. C. D. Barracho appealed on the following grounds :—

1. The Civil Judge had no jurisdiction to make the said order, inasmuch as the Petitioner objected to the appointment of the umpire finally named by the Court, and the submission by the petitioner expressly provided for the appointment of an

umpire by the arbitrators, such umpire to be selected from seven individuals named in the submission. 1872. May 13. C. M. P. No. 56 of 1872.

2. The provisions of Chapter VI of the Code of Civil Procedure were not complied with.

O'Sullivan for the petitioner.

Sloan and *Sanjiva Rau* for the counter-petitioners.

The Court delivered the following

JUDGMENT :—This was a case of arbitration, and, at the hearing before this Court, Mr. Sloan took the preliminary objection that no appeal lay against a decision founded upon an award. If there had been a valid award the appeal would not lie (5 M. H. C. R. 404). But in this case it is contended that there has been no valid award.

Mr. C. D. Barracho submitted the matters in dispute between himself and the other parties to suit No. 911 to arbitration, on the terms that an umpire should be selected from seven persons whom he named. And those terms were not objected to by the other side. Arbitrators were agreed upon and Rosario, one of the seven persons named in the submission, was appointed an umpire. But Rosario and some of the arbitrators declined to act. Fresh arbitrators were then chosen, but no umpire; and, the arbitrators being equally divided in their opinion on the case, the Court appointed as umpire a gentleman who may have been otherwise a competent person, but who was not one of the seven persons named in the submission. To the appointment of that umpire Barracho objected, but the Judge overruled the objection, and passed judgment in accordance with that umpire's award. The question is whether the Judge had the power to appoint an umpire who was not one of the seven named in the submission. Section 319 of the Code of Civil Procedure gives the Court power to appoint an umpire instead of one who may have declined to act. But we think that that Section must be read together with those which go before it, and Section 316 places it within the power of the parties to agree beforehand how the matter shall be determined in case of a difference of opinion between the arbitrators. In the present case it was stipulated

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as an essential part of the submission that an umpire should be chosen from seven persons named; and we are of opinion that the power of the Court to appoint an umpire under Section 319 was controlled and limited by that stipulation. The Judge appears to have named an umpire, not by reason of the parties to the suit failing to appoint one out of the seven selected or by reason of any of those seven refusing to act, save Mr. Rosario, but of his the Judge's own motion, against the wish of at least one of the parties to the submission. The umpire not being one of the seven persons named in the submission there was no valid award. The order of the Civil Court must, therefore, be annulled, and the case remanded to that Court for disposal. The costs of this appeal will be costs in the cause. We wish to draw the attention of the Judge to Section 316, which requires a formal order. Had such order been drawn up the difficulty, very probably, would not have arisen.

Appeal allowed.

Appellate Jurisdiction. (a)

Regular Appeal No. 35 *of* 1872.

L. VENKATE'SA NA'YUDU and 2 others...*Appellants.*

SHRIVAN SHATAGOPA SHRI SHATAGOPA SWA'MI and another ... ... } *Respondents.*

Plaintiffs, members of the Committee appointed under Act XX of 1863, sued to eject defendants (the Dharmakarta and his agents) from the possession and management of the temple dedicated to Srí Víraràgava Swámi at Trivellore and to establish their (plaintiffs') right to the possession and control of the said temple. Defendants denied the right of the plaintiffs to exercise any control whatever over the temple. This right depended upon whether at the period of the passing of Act XX of 1863, the nomination vested in, was exercised by, or was subject to the confirmation of the Government, or any public officer. It was admitted that, in 1842, the Board of Revenue did, so far as it could, divest itself of all right to interfere with the appointment of Dharmakarta, but it was contended for the plaintiffs that it was not in the power of the Board of Revenue so to divest itself of the duties imposed upon it by Regulation VII of 1817. *Held,* that assuming the Board of Revenue to have had such a right, there was nothing in Regulation VII of 1817 to prevent them from renouncing that right if they chose.

1872. *May* 20. *R. A. No.* 35 *of* 1872.

THIS was a Regular Appeal against the decision of E. B. Foord, the Civil Judge of Chingleput, in Original Suit No. 15 of 1868.

The plaintiffs, who were members of the Committee appointed under Act XX of 1863, sued to eject the defendants from 1 to 3 (the 1st of whom was Dharmakarta, and the 2nd and 3rd his agents) from the possession and management of the temple dedicated to Srí Víraràgava Swámi at Trivellúr, on the ground that they had malversated the affairs thereof, and to establish their (the plaintiffs') right to the possession and control of the said temple.

A claim for damages against the Collector and Magistrate of the Madras District for wrongfully ejecting plaintiffs from the said pagoda was also included; but on an objection being made by defendants' counsel at the 1st hearing, on the ground of misjoinder, it was withdrawn.

The defendants from 1 to 3 denied the right of the plaintiffs to exercise any control whatever over the temple in question, which they averred was one of the kind described in Section 4 of Act XX of 1863, the Dharmakartaship being al-

(a) Present :—Holloway and Kindersley, J J.

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ways held by the Jheer of the Agobalam Mutt, who had always appointed his own successor. They denied the malversation alleged in the plaint, and further pleaded the Law of Limitation in bar to the suit.

The following issues, among others, were framed,

Whether the temple in question is one of those described in Section 3 of Act XX of 1863?

Whether the suit is barred by the 12 years' clause of the Law of Limitation?

The judgment of the Civil Judge contained the following:—

"The limitation bar pleaded by defendants having been abandoned during the argument, the main point for determination is the question raised in the 1st issue, and it must therefore be first considered whether the plaintiffs have succeeded in proving that the temple in question falls within the scope of Section 3 of Act XX of 1863, that is, whether, at the time of the passing of that Act, the nomination to the office of trustee rested with the Government or any public officer, or was subject to the confirmation of the Government or any public officer.

The only evidence produced by plaintiff to show how the nomination of trustee was made previous to 1842, when the Government resolved to sever their connection with religious establishments throughout the country, is exhibit A, which is a letter from the Collector of the Chingleput District to the Board of Revenue, dated 16th March 1790, from which it appears that, at that time, the nomination of trustee then rested with certain míráṡidárs of the temple, subject to the confirmation of Government, but between the date of this letter and 1842 there is nothing to show that any formal recognition by Government, or by any public officer, of subsequent nominations was ever recorded......................

Exhibits from B to M, and Exhibit O are dated in 1842, and the subsequent years. B, C, D, E, F and H are correspondence between the Board of Revenue and the Collector re-

garding the transfer of certain temples (among which the one now in dispute is included) to the trustees thereof, and the withdrawal of all interference therein on the part of the officers of Government. In Exhibit D, the Collector states that as he had ascertained that the Dharmakartas of this temple had been chosen for many years from among the disciples of the Jheer of the Agobalam Mutt (the 1st defendant in this suit), he recommends that the Jheer be nominated Dharmakarta permanently, which arrangement the Board of Revenue record their approval of in Exhibit E. The remaining exhibits do not show any further interference on the part of the officers of Government in the appointment of Dharmakarta, though Exhibit J shows the intention of Government to continue their control over the lands attached to the temple so far as to ensure their proper management.

Of the documentary evidence produced by defendants, I think that Exhibits 3, 4, 5, 15, 16, 17, 18 and 19 show unmistakable acts of ownership on the part of the successive Agobalam Jheers in the temple in question, from a period commencing so far back as 1818 and continuing up to 1840 (Exhibit 19); and I think it is, therefore, to be inferred that the Government during that time respected the right of succession to Dharmakartaships of the temple, which was inherent in the Jheers of the Mutt.....................

The result of this trial leaves no doubt in my mind that the plaintiffs have entirely failed to establish that this temple falls within the scope of Section 3 of Act XX of 1863.

The judgment of the High Court in *Regular Appeal No.* 12 *of* 1867, 5 M. H. C. R. 53, which is a similar case, explains at length the meaning which should be attached to Sections 3 and 4 of the said Act; and I am glad to guide myself in the disposal of this suit by the opinion therein expressed. The temple which formed the subject of dispute in that suit, had, like this temple, been subject to the authoritative superintendence and interference of the Government, until 1842, when they adopted measures "to divest themselves of the duties and responsibilities imposed by law in connexion with Hindu and Muhammadan religious establishments."

1872. May 20. R. A. No. 35 of 1872.

Pursuant to this determination, the Board of Revenue, as shown in the correspondence quoted above, sanctioned the recommendation of the Collector that the Jheer of the Agobalam Mutt should be permanently appointed Dharmakarta of this temple, and that the Government and their servants should withdraw from all further interference in its affairs.

I think it has been very clearly proved by the defendants that this state of things continued uninterruptedly down to the time when Act XX of 1863 took effect, and that my finding on the 1st issue must be in the negative.

Such being the case, it is unnecessary to record any finding on the remaining issues, nothing remaining but to dismiss this suit with costs."

The plaintiffs appealed against this decision upon the following grounds—

1st. The plaintiffs were upon the evidence entitled to a decree for possession of the temple and the property belonging to it.

2nd. The temple is one to which Section 3 of Act XX of 1863 applies and not Section 4 of the Act as found by the Civil Judge.

O'Sullivan and *Ráma Rau* for the appellants, 1st, 5th and 6th plaintiffs.

Miller and *Rámachandraiyar* for the 1st respondent, the 1st defendant.

The Court delivered the following

Judgment:—The question is whether by force of the appointment as Committee and of the Act XX of 1863, the right to manage this pagoda vested in the plaintiffs.

This depends upon whether at the period of the passing of the Act the nomination (presumably the right to nominate) vested in, was exercised by, or whether the nomination was subject to, the confirmation of the Government or any public officer.

It is not to be disputed and Mr. O'Sullivan did not dispute that in 1842 the Board of Revenue (C. D. E. F.) did, so

far as it could, divest itself of all right to interfere. It is also clear that, as a matter of fact, there has never been since that time any interference whatever, although several cases of succession have occurred. This fact is important both for the interpretation of the Act of 1842 and as evidence of the rights of the parties.

1872. *May* 20.
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Mr. O'Sullivan, however, contended that it was not in the power of the Board of Revenue so to divest itself of the duties imposed upon it by Regulation VII of 1817.

There seem to us two fatal defects in this argument. The fact of their interference and the assertion of their right to interfere are the only evidence of the existence of such right. That for many years they most beneficially for the institution, perhaps irregularly, assumed such a right in every pagoda, this and many other cases distinctly show. It would, however, be impossible to treat the fact of interference as evidence of a strictly legal right to interfere. This has been several times noticed in previous cases.

Assuming, however, that they had such a right, we can see nothing in Regulation VII of 1817 to prevent them from renouncing that right if they chose.

The scope of that Regulation is the prevention of the misapplication of endowments, and all its provisions are to be read with reference to that purpose.

Section XIII gives the largest power of making any arrangement which the Board may consider best adapted to secure the purposes which the Regulation had in view, and in their letters the Board show that they conceived that this purpose would be best secured by vesting the management in the Jheer himself, instead of in persons elected from his disciples. They seem to have believed that his reputed piety and position would be the best security against embezzlement. It seems to us that they had full power so to act, and that the effect of their act was to vest in the Jheer for the time being the management of this institution. It seems to us plain, therefore, that nothing passed to the Committee by their appointments, and that this appeal must be dismissed with costs.

Appellate Jurisdiction. (a)

Referred Case No. 1 *of* 1872, *from the Court of Small Causes, Madras.*

ALBERT FOSTER PATER *and others,*
against
HENRY EVANS GORDON *and another.*

Upon the following facts referred—" Defendants contracted with plaintiffs as agents of the Captain and owners of a certain ship then in the Madras roads. The plaintiffs were aware of this at the time when the contract was made. The Captain was at the time in charge of his ship. At the time of the contract nothing was said by either party as to the person or persons on whose credit the contract was made—All that occurred being that defendants, known by plaintiffs to be acting as agents for the Captain and owners of the ship, agreed with plaintiffs to carry certain of their goods on board the ship to Calcutta. The defendants did not at the time of the contract in terms say that they contracted only as agents. The plaintiffs did not know the names of the owners, nor of the Captain; nor had they any further or other knowledge of the latter than that which his designation by his office of master of the ship conveyed."—*Held*, that in the absence of anything more than knowledge that the defendants were acting as agents of the master and owners of a ship in the roads, a decision declaring the agents liable was strictly in accordance with English law.

1872. *February* 23. *R. C. No.* 1 *of* 1872.

THIS was a case referred for the opinion of the High Court by T. M. Busteed, First Judge of the Court of Small Causes at Madras, in Suit No. 19,569 of 1871.

The *Advocate General* for the plaintiffs.

O'Sullivan for the defendants.

The Court delivered the following

JUDGMENT :—It appeared upon the argument that one of the learned judges of the Small Causes Court had made a decree against the defendants, and this case is submitted, and it is stated that the answer to it will enable the judges to dispose of all matters of difference between them.

The case is thus stated.—

" The defendants contracted with the plaintiffs as agents " of the Captain and owners of the ship *Durley* then in the " Madras roads. The plaintiffs were aware of this at the

(a) Present :—Morgan, C. J. and Holloway, J.

"time when the contract was made. The Captain was of "course at the time in charge of his ship. At the time of the "contract nothing was said by either party as to the person "or persons on whose credit the contract was made. All we "know of the contract itself is, that defendants, known by the "plaintiffs to be acting as agents for the Captain and owners "of the ship, agreed with the plaintiffs to carry certain goods "of plaintiffs on board the ship hence to Calcutta."

1872. *February* 28. *R. C. No.* 1 *of* 1872.

"The defendants did not at the time of the contract in "terms say that they contracted only as agents. The plain-"tiffs did not know the names of the owners, nor of the "Captain; nor had they any further or other knowledge of "the latter than that which his designation by his office of "master of the ship conveyed."

"Upon the above facts the question which, under the "provisions of Section 55, Act IX of 1850, I beg to submit "for your Lordships' opinion is:—

"Whether, assuming no question of foreign principal to "arise, the facts above stated show a sufficient disclosure of "defendants' principal to bring the case within the rule relat-"ing to contracts made by agents on behalf of disclosed "principals?"

The question amounts to this—was there anything in these facts to render it erroneous in English law to hold the agents liable? The rule as to disclosed and undisclosed principals is merely a subordinate one assisting to the answer of the question—Who contracted the obligation? There is, of course, no doubt that a man who declares that he acts *for another and instead* of another is not personally liable, because he is offering to the other contracting party a transaction not with himself, but with another, and the acceptance must be taken to accord with the offer.

There is as little doubt that he may declare that he is acting in the interest of another, but make the transaction his own.

This conclusion may be deduced from the form of expression. [See *Tanner* v. *Christian*, 4 E. & B. 591: *Leonard* v.

1872. February 23. R. C. No. 1 of 1872.

Robinson, 5 E. & B. 125, for the one conclusion, and *Deslandes* v. *Gregory* 2. E. & E. 602, and *Lyon* v. *Williams* (*St. Ag.* sec. 268, n. 1) for the other].

It may also be derived from the character of the transaction itself (*re ipsâ*). That character may be determined by evidence of a usage of trade or by other circumstances. It is, however, a settled rule of both English and American law that the mere fact of a man being known to be a person who usually acts for another will not exonerate him if he deals in his own name. *Paterson* v. *Gandasequi*. (*a*)

It is also a settled rule of construction that if a man, even stating himself to be an agent, does not name the principal, the other party is not bound to make enquiries, but is at liberty to treat him as making the transaction his own. "To whom is credit given?" is not the proper question for determining whether one really an agent is personally bound, but—"Was credit given to the man known to be acting for another in circumstances that entitled the giver of the credit to treat him as making his own a transaction in the interest of that other?"

In English law the giver of the credit is so entitled, although the existence of the principal and the place of his residence are both known, and where by enquiry the other party might have ascertained that name. *Thomson* v. *Davenport*. (*b*)

There is an American case quoted (*Wallace's Notes*, Vol. I. 636, 4th Edition) which seems to bear the other way. (*Waddell* v. *Mordecai*). This is not a decision of the Supreme Court of the United States and is a case upon the construction of a bill of lading, and the dicta accompanying the decision on the construction are opposed to both English and American cases of the highest authority.

In the absence of anything more than knowledge that the defendants were acting as agents of the masters and owners of a ship in the roads, the decision declaring the agents liable seems to us to have been strictly in accordance with English law.

(*a*) 15 East 62.
(*b*) 9 B. and C. 86.

Appellate Jurisdiction (a)

Regular Appeal No. 40 *of* 1872.

CHEDAMBARAM CHETTI.......................*Appellant.*

RANGA KRISTNA MUTTUVIRA PUCHAYA NAIKAR, Zamindár of Marangapúri. } *Respondent.*

The plaintiff sued on a bond for Rupees 67,000, obtained from the defendant (the Zamindár of Marangapúri) in the following manner. In July 1864, Tirumala Puchaya Naikar, the late Zamindár, died leaving 3 widows but no issue, and, in September 1864, the Government with the consent of the widows recognised the defendant, who was then a minor, as successor to his step-brother, the said T. P. Naikar. The widows afterwards became dissatisfied, and in December 1866 executed a bond in plaintiff's favor, by the terms of which they bound themselves to prefer suits and claims with a view to obtain possession of the zamindárí on their own account by ousting the minor, and the terms upon which they agreed to take this action were these :—The plaintiff was to conduct the suit entirely at his own expense, and, as soon as the zamindárí should be handed over to the widows, they were to pay the plaintiff one lac of Rupees out of the income of the estate as a reward for his pecuniary and other services in assisting them to obtain it ; together with a moiety of the savings which the Court of Wards might have effected during the management of the estate, and which estate the plaintiff was moreover to keep under his own management, by appointing an agent to superintend it, until the widows should have redeemed it by payment of the lac of Rupees promised ; failing in which the widows bound themselves and heirs to make a lump payment out of their own funds to the plaintiff of one lac of Rupees with interest, together with a moiety of the Court of Ward's savings. Accordingly, in September 1868 the plaintiff brought a Suit (No. 30 of 1868) in the name of Lekkamani, the senior widow, against the Collector for the zamindári, and, the minor attaining his majority in July 1869, he was thereupon made 2nd defendant in the suit by the plaintiff. The final hearing of this Suit (No. 30 of 1868) was fixed for the 16th August 1869, and, on or about the 11th, the plaintiff, Lekkamani, sent for the 2nd defendant to her palace and proposed a compromise on the terms that the widows should have 3 villages and that 2nd defendant should settle the present plaintiff's "small" account. A rázináma to this effect was drawn up and the young Zamindár was persuaded, by threats of ruining him with litigation if he did not comply, to sign it and to give a note of hand for Rupees 62,000 to plaintiff's agents. A few days afterwards plaintiff called on defendant, and by similar threats extorted from him a bond for Rupees 67,000 (now sued on) in lieu of the note of hand for Rupees 62,000. The rázináma was, on presentation, rejected by the Court, the Suit (No. 30 of 1868) proceeded to judgment and decree, and at the time the present suit was brought was under appeal. The Civil Judge found that the bond was obtained under undue influence and by threats, and that the defendant received no consideration for it. The suit was accordingly dismissed. *Held,* on appeal, that, without dissenting from the judgment below on the ground of vicious grounds of determination of the defendant's will, the judgment of the Court might be put on the very satisfactory grounds.—That the contract was made with the woman ; that there was a promise to pay this sum to the plaintiff whom she believed to be her creditor ; that in pursuance of that arrangement the document was given. The cause of giving it was the compromise of the suit. That cause had wholly failed. It was a case, therefore, of suing for money which, if it had been paid, the defendant could have recovered (*ob causam datorum*).

(a) Present :—Holloway and Kindersley, JJ.

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R. A. No. 40
of 1872.

THIS was a Regular Appeal against the decision of R. Davidson, Civil Judge of Trichinopoly, in Original Suit No. 14 of 1870.

The suit was brought to recover Rupees 69,456-10-8, principal and interest on a bond for Rupees 67,000, dated the 16th August 1869, with subsequent interest and costs.

The defendant, the Zamindár of Marangapúri, admitted the genuineness of the plaint bond A, but met the suit by the defence that the bond had been obtained from him under improper influence, fraudulently, and without consideration having been received for it, and that the suit was tainted with champerty and ought to be dismissed.

The following issues were settled—

1. Whether, as affirmed by the defendant and denied by the plaintiff, the plaint bond A had been obtained from the defendant under undue influence and threats of the plaintiff or his people, or not.

2. Whether, as affirmed by the defendant and denied by the plaintiff, the former had obtained no consideration for the plaint bond A.

The Civil Judge delivered a judgment from which the following is taken—

" In dealing with this case, it is of importance that regard should be had to the circumstances and conditions of the contracting parties at the time when the bond A was executed.

They were these, as disclosed in Original Suit No. 30 of 1868, out of which this suit may be said to have arisen, and from what has been elicited at the present trial:—

On the 17th July 1864, Tirumalai Puchaya Naikar, the late Zamindár, and step-brother of the defendant, demised, leaving three widows but no issue. On the day preceding his demise (16th July) he wrote to the Collector of Trichinopoly, informing him that as he felt he was dying he had installed the defendant his step-brother as his successor, and requested that Government would recognize him as such; and on the 18th *idem* Lekkamani his senior widow (and who is the plaintiff in Original Suit No. 30 of 1868) and the present defendant wrote a joint letter to the Collector, reporting Tirumalai Pu-

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chaya Naikar's death, and in it Lekkamani recognized the defendant as his successor. Thereupon the Collector directed the Tahsildár of Kuluttalai and the Sub-Magistrate of Manapary to proceed to Marangapúri, and ascertain what the wishes of the widows were; they did so, and took statements from the three widows, in which they made a full and unqualified recognition of the present defendant's right to succeed their husband in the zamindári. The Collector then communicated with the Board of Revenue, and the Board with Government, and, on the 17th September 1864, the Government recognized the defendant, who was then a minor, as successor to his step-brother, the late Zamindár, and Mr. Banbury the then Collector, as representative of the Court of Wards, undertook the temporary management of the estate under Regulation V of 1804, and superintended the education and training of the defendant, who, on attaining his majority in July 1869, was duly installed as Zamindár of Marangapúri on the 23rd of that month.

For some time during the period of the defendant's minority the widows of the late Zamindár accepted their usual maintenance allowance from the Collector; but in 1866 they discontinued the practice, and the Collector as guardian found it necessary to issue an order and proclamation, Exhibits Nos. 2 and 3, on the 6th September 1866, warning all parties against advancing money to the widows, and notifying that no portion of the estate could be held liable for any debts which they might contract; and it has not been disputed that due publicity was given to the proclamation in question.

I find, however, that notwithstanding the very stringent orders which the Collector gave on the subject, the widows entered into an arrangement with the present plaintiff on the 21st December 1866, and executed a bond (marked B) in his favor, by the terms of which they bound themselves to prefer suits and claims before the Civil, Revenue and other superior officers, with a view to obtaining possession of the zamindári on their own account out of the hands of the Court of Wards by ousting the defendant, and the terms on which they agreed to take this action were these:—(vide Exhibit B.) The plaintiff was to conduct the suit entirely at his own expense, and, as

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soon as the zamindárí should be handed over to the widows, they were to pay the plaintiff one lac of Rupees out of the income of the estate, as a reward for his pecuniary and other services in assisting them to obtain the estate; together with a moiety of savings which the Court of Wards would have effected during the management of the estate, and which estate the plaintiff was moreover to keep under his own management, by appointing an agent to superintend it, until the widows should have redeemed it by payment of the lac of Rupees promised; failing in which, and a few minor stipulations, the widows bound themselves and heirs to make a lump payment out of their own funds to the plaintiff of Rupees 1,00,000 with interest, together with a moiety of the Court of Ward's savings.

This done, the plaintiff, in September 1868, admittedly instituted Suit No. 30 of 1868 on this Court's file, in the name of Lekkamani the senior widow of the late Zamindár, against the Collector. The suit was for the recovery of the Marangapúri zamindárí and other property valued in all at Rupees 4,11,997-3-1, and no sooner had the present defendant been put in possession of his estate on the 23rd July 1869, on attaining his majority, than the plaintiff, on the 28th *idem*, moved this Court by Miscellaneous Petition No. 709 of 1869 to include him as 2nd defendant in the suit, and he was made a party, as appears from the notice Exhibit No. 4, dated 2nd August 1869.

Now, the final hearing of Original Suit No. 30 of 1868 was set for the 16th August 1869, and on the application of Lekkamani, the plaintiff in that suit, Mr. Cadell, the then Acting Judge, sent a commission to Marangapúri to take the evidence of Lekkamani, of the other two widows, and of a sister of the late Zamindár, and the Commissioners reached Marangapúri on the 11th August, and from that day the proceedings connected with the execution of the rázinámah put in in Original Suit No. 30 of 1868, and of the bond A in this suit, commenced.

Now, the case for the plaintiff is this, and it is not disputed by the defendant, that on that very day, viz., 11th August, two messengers by name Tévar Naik and Marutha-

naigam Pillai, the 6th witness for plaintiff, and the 1st for defendant, were dispatched in hot haste to fetch the plaintiff from Shivaganga; and it is admitted that he reached Marangapúri on the evening of the 14th. But meanwhile, viz. on the 12th, the defendant had been induced to give a note of hand for Rupees 62,000 in the name of one Ranga A'yyangar, in acknowledgment, it is alleged by the plaintiff, of his having accepted all Lekkamani and the other widows' obligations to plaintiff on account of the bonds B and C for one lac and for Rupees 20,000, respectively, together with certain debts which the widows had subsequently contracted; and on the following day, viz. the 13th, the rázináma, Exhibit No. VI, was executed.

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The plaintiff asserts that on the forenoon of the 15th, he and the defendant, together with certain others named, proceeded to the widow Lekkamani's palace, where after certain accounts had been looked into, it was ascertained that a balance of Rupees 54,000 was due by the widows to the plaintiff; that the defendant then of his own free will signified his readiness not only to accept that liability on their account, but also undertook to pay the plaintiff Rupees 12,500, or ⅛ of a lac of Rupees, in extinguishment of the bond B for Rupees 100,000, making a total aggregate sum of Rupees 67,000, for which amount he on the following day, viz. 16th August, voluntarily gave the bond A to plaintiff through his (plaintiff's) agents Síva Ráma Chetti and Vencatésa A'yyan, the plaintiff's 3rd and 4th witnesses.

On the other hand the defendant asserts that when he accompanied the plaintiff and others to Lekkamani's palace on the occasion in question, no accounts at all were examined; that Lekkamani both then, and before he gave the note of hand on the 12th August, assured him that she merely owed plaintiff a small sum, and that first the note of hand for Rupees 62,000, and eventually the bond A for Rupees 67,000, were obtained from him against his will, upon a misrepresentation of facts, under the influence of fear occasioned by the threats employed to induce him to sign them, and without his having had an opportunity of consulting with the Collector, as he was anxious to do.

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It appears then, that on the 23rd July 1869 the defendant was installed as Zamindár; that on the 28th July this Court was moved to make him a supplemental defendant in Original Suit No. 30 of 1868; that on the 30th July he was made supplemental defendant; that on the 2nd August 1869, he got notice of the same. That on the 16th August the suit was to come on for final hearing and did so; that on the 11th August the Commissioners reached Marangapúri; that on the same day the plaintiff was sent for from Shivaganga; that on the 14th August, in the evening, he arrived at Marangapúri; that on the 12th August the note of hand for Rupees 62,000 was taken from the defendant; that on the 13th August the rázináma in Original Suit No. 30 of 1868 was signed by Lekkamani and present defendant and their vakils; that on the 15th August the plaintiff asserts that the accounts between the plaintiff and Lekkamani were examined by the agents for Lekkamani and the plaintiff, in presence of the defendant; that on the 16th August the bond A for Rupees 67,000 was executed, and the rázináma was put in in Original Suit No. 30 of 1868.

Now, I observe that the note of hand for Rupees 62,000 was, as admitted on both sides, given by the defendant to Ranga A'yyangar, and I think it clearly appears from the testimony of the defendant's witnesses that the said Ranga A'yyangar was the plaintiff's agent; the fact is, however, denied by the plaintiff and his witnesses, and it is a remarkable fact that the plaintiff has prudently abstained from placing Ranga A'yyangar in the box, notwithstanding that he cited him as a witness on his behalf. The execution of the note of hand took place on the day after the arrival of the Commissioners at Marangapúri; and the following are the circumstances under which the defendant asserts that he was impelled to act as he did.

He has stated on oath that after the arrival of the said Commissioners at Marangapúri, Lekkamani, the nominal plaintiff in Original Suit No. 30 of 1868, sent for him to her palace and made overtures to him with a view to having the Suit No. 30 amicably adjusted, by suggesting that she (Lekkamani) and the two other widows should have three Pannai villages given them for their maintenance, and that he, defendant,

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should further settle the plaintiff's "small" account, and he said he would think the matter over; that same day Síva Ráma Chetti, the plaintiff's 3rd witness, Kuppáyyar his 5th witness, Ranga A'yyangár not examined, and Vencatésa A'yyar, his 4th witness, asked him for a note of hand for Rupees 62,000; he was staggered at the amount of the "small" account, pleaded in vain for time to consult the Collector, the 1st defendant in the suit, but was eventually terrified into acquiescence by the threats which the said parties held out; that in the event of non-compliance on his part, they would have Original Suit No. 30 of 1868 prosecuted as far as the Privy Council, and that even if he (the defendant) succeeded in retaining the zamindárí, the Chetti, meaning the plaintiff, was so wealthy, that he would assuredly involve the defendant in such pecuniary difficulties that he would be unable to extricate himself, save by the sale and loss of his fine estate, like the Shívaganga and Chokkampatti Zamindárs; and the defendant's 1st, 2nd and 3rd witnesses, Nalattambi Pillai, Navanithakristnam Pillai and Maruthanáyagam Pillai fully corroborate his statement.

The defendant has further deposed on oath that, on the 15th August, the plaintiff Chedambaram Chetti presented himself before him at Marangapúri (he having been fetched from Shívaganga where he resides) and informed him that his agents had inadvertently taken a note of hand for Rupees 62,000 only, whereas the amount ought to have been Rupees 67,000, and demanded a bond for that latter amount. He remonstrated, but next day (16th August) on the plaintiff and the already mentioned other four individuals threatening him that unless he gave a bond for the Rupees 67,000 demanded, they would get the rázináma cancelled, the zamindárí sold, and an action brought on the note of hand for Rupees 62,000 which the plaintiff held, he, after having pleaded in vain for time to consult the Collector, yielded through terror, and eventually executed the bond A for Rupees 67,000 on a stamp for Rupees 300, which the plaintiff himself produced; and the defendant's statement is fully borne out by his 1st and 2nd, 3rd and 4th witnesses, of whom the 3rd witness was the writer of, and the 4th witness an attesting witness to, the bond A................

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Now, a very careful consideration of the evidence adduced on either side in regard to the disputed points as to whether or not threats and undue influences and pressure were applied to the defendant at the time when he first gave the note of hand for Rupees 62,000, and subsequently when he gave the bond A for Rupees 67,000 to plaintiff in lieu thereof, satisfies me that truth lies with the defendant and his witnesses.

I think the evidence in the case leaves me no reasonable room for doubting this fact; as also for being perfectly satisfied that no accounts were settled before the defendant gave the bond A for Rupees 67,000. I think there is the strongest ground for believing from the evidence adduced, and from a consideration of all the surrounding circumstances of the case, that the boy Zamindár, fresh from school, inexperienced in the ways of the world, glad perhaps at the prospect of entering peaceably on the enjoyment of his estate, instead of commencing his career with an expensive law-suit, which might lead him he knew not where,—was in the first place fraudulently misled, by Lekkamani's misrepresentation, into believing that she had not expended more than what she vaguely designated a "small" sum in suing the defendant and the Collector, in Original Suit No. 30 of 1868; that, subsequently, the defendant, yielding to fear at the spectacle of ruin and misery which the plaintiff's agents pictured to him as the inevitable result of his failing to execute the note of hand for Rupees 62,000, and without having it in his power to exercise a free choice in the matter, put his hand to the note for Rupees 62,000, which sum he was induced by similar threats on the part of the plaintiff and his satellites to raise to Rupees 67,000, for which latter sum he became an involuntary party to the bond A.

Now, it is not disputed that, as things have turned out, the defendant has absolutely obtained no advantage or consideration for the bond A, because, the rázináma having been rejected, Original Suit No. 30 of 1868 is still being prosecuted by the plaintiff in Lekkamani's name with the utmost assiduity; and it has never been contended that the defendant himself had obtained any consideration for A, up to the time of its execution.

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It is a very remarkable circumstance connected with this case that not a tittle of documentary evidence has been adduced to show what money the plaintiff really advanced to Lekkamani..

I am clearly of opinion that the contract under A cannot be enforced against the defendant, because I think there is abundant evidence on the record to show that the signing of the contract under A was an involuntary act on the part of the defendant, who, without having a free choice of saying no in the matter, yielded to the undue influence of extreme terror, occasioned by the threats held out by the plaintiff and his agents; and I think that he is justly entitled, therefore, to come forward and seek to relieve himself from such contract and to obtain such relief.

A very careful consideration, then, of the evidence and of all the material circumstances surrounding the case, leads me to the inevitable conclusion that the defendant is just such a person as deserves to be specially favored by the law. He is shown, I think, to have been helpless to protect his own rights, and he was powerless to contend successfully against what appears to me to have been a combination of fraud, cunning, avarice and heartlessness arrayed against him, and to which even the strongest mind must have eventually succumbed.

And inasmuch as I find on the 1st issue that the bond A was obtained from the defendant under undue influence and threats, and on the 2nd issue that the defendant has obtained no consideration for the bond A, I dismiss the suit, and direct that the plaintiff do pay all costs therein."

The plaintiff appealed upon the following grounds:—

The finding of the Civil Judge (upon the two issues framed) in favor of the defendant was against the weight of evidence.

No reliable evidence was given on the part of the defendant to show that he signed the bond sued upon by reason of threats or undue influence used or exercised by the plaintiff or by his agents; or that any threats were used which would render the contract invalid; and upon the whole evidence the

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Civil Judge ought to have found that the defence upon this ground was not established.

There was abundant consideration for the undertaking of the defendant to pay the debt due to the plaintiff by the widows of the late Zamindár.

The undertaking was part of an arrangement made between the defendant and the widows of the late Zamindár for the withdrawal of Original Suit No. 30 of 1868 in the Trichinopoly Court, brought by the widows to recover possession of the zamindárí. The arrangement so made was subsequently assented to by the present plaintiff.

O'Sullivan for the appellant.

Gould and *Sanjiva Rau* for the respondent.

The Court delivered the following

JUDGMENT :—The plaintiff, a money lender, was probably the author, certainly the promoter and conductor of a suit against the present defendant, carried on by the widow of his elder brother. Pure zeal for the interests of justice did not animate the plaintiff, for by the document B he exacts absolute submission to himself and his agents, right to possession of the zamindárí when recovered—in order to work off a lien of a lac of Rupees which this document secured to him. His supposed rights, under this agreement, of preventing the woman from compromising the suit, led to his interference in the matter out of which this transaction arose.

The defendant is joined in the suit and sent for from school, and induced to enter into a compromise to be presented to the Court. A document is drawn up to be presented to the Court, saying not one word about the payment of the woman's debts. That compromise was rejected by the Court, and the suit against the present defendant proceeded to judgment. If, therefore, the money had been actually paid to the woman herself as part of the arrangement for a compromise, it seems impossible to say that the defendant could not have recovered it from her. "*Ob rem igitur honestam datum ita repeti potest si res propter quam datum est secuta non est.*" The argument that the compromise intermediately failed through the defendant's own act, even if it so appeared, could avail nothing, for the

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then plaintiff was not bound to proceed with the suit, but might have herself enforced whatever obligations her contract had created. Her conduct, therefore, in pressing the suit to an end, was, to say the least of it, an abandonment on her part of all the rights which had accrued to her upon the footing of its being abandoned. It is, of course, still clearer that the entire cessation of the cause would have prevented her from recovering, if the present document had been given to her.

It seems that the case cannot be otherwise when the promise is to pay money to a third party. Keeping out of sight all technical questions arising out of the English doctrines (*Price* v. *Easton*, 4 B. & Ad. 434: *Tweddle* v. *Atkinson*, 1 B. & S. 393) the case is still that of undertaking to pay the debts, real or imaginary, of the woman, and entire failure of the cause for which that liability was undertaken. It seems unnecessary to advert to the vicious character of the agreement by virtue of which this plaintiff assumed to interfere in the matter. An agreement to secure that litigation shall continue as long as it suits him who has made a stipulation for a share of its proceeds, and a sum of money to be paid if she puts an end to it without that consent, will perhaps scarcely be considered consistent with public policy, even with the modern doctrines of the blessings of litigation.

As to the novation, which was plainly not the consideration, the retention of the documents executed by the woman shows that there was none. Delegation is set out in the document sued upon, and, of course, on the ground of the compromise, as the whole evidence shows.

The difficulty of setting aside the document on the ground of undue influence arises from the threats being of consequences perfectly legal, the potentiality of a rich man ruining a poorer one, even if he succeeds, and the probability of that poorer one failing if the witnesses, who can be produced in any quantity, are consistent in their perjury. The terror created by a man of this sort, exulting over the ruin which he and his like have already effected, is undoubted. He was provided with pregnant examples of his powers, and we are by no means prepared to say that relief upon this ground would be wrongly

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given. The question of whether the will has been self-determined is one not to be settled by finding some case similar to the one before us, but by applying the principles upon which such relief ought to be given to the facts of the case. If it is old in the principle, but new in the instance, it matters not.

Further, the circumstances of the particular country, the particular class, and even of the particular individual, are important elements in the determination. Without, therefore, at all saying that we should dissent from the judgment below on the ground of vicious grounds of determination of the defendant's will, we think that the judgment of the Court may be put upon the very satisfactory grounds—That the contract was made with the woman; that there was a promise to pay this sum to the plaintiff, whom she believed to be her creditor; that in pursuance of that arrangement the document was given. The cause of giving it was the compromise of the suit. That cause has wholly failed, for so far from being compromised it was brought here on appeal, and doubtless, with the money of the plaintiff, it will be carried further still. It is a case, therefore, of suing for money which, if it had been paid, the defendant could have recovered (*ob causam datorum*).

For a promise made to the plaintiff, otherwise than as a part of the arrangement with the woman, there was no "*caussa*" at all, and, in the language of the English law, there was no consideration moving from him at all; for it cannot be pretended that his agreement gave him any right to prevent the woman from compromising the suit if she chose. On the almost impossible hypothesis, however, that his junction was a necessity, the utter failure of the "*caussa*" is equally apparent. The appeal should be dismissed with costs.

Appellate Jurisdiction. (a)

Civil Miscellaneous Regular Appeal No. 182 *of* 1872.

R'AMALINGA PILLAI......................*Appellant.*

SATTEAS'IVA PILLAI......................*Respondent.*

Plaintiff brought a suit, Original Suit No. 1 of 1858, in the Civil Court of Cuddalore, claiming certain lands and mesne profits for 1 year, viz. 1858, and obtained a decree as sued for. By Petitions Nos. 312 of 1864 and 459 of 1868 he applied for execution, claiming mesne profits up to 1864, which the Civil Court awarded. *Held*, on appeal, that as the mesne profits in regard to which the appeal was made were not made payable by the decree, they could not be awarded in execution.

C. M. S. A. No. 290 *of* 1868 [4 M. H. C. R. 257] followed.

1872. *June* 28. *C. M. R. A. No.* 182 *of* 1872.

THIS was a Regular Appeal against the order of W. Hodgson, the Civil Judge of Cuddalore, dated 31st January 1872, passed on Miscellaneous Petitions Nos. 312 of 1864 and 459 of 1868.

The plaintiff, in Miscellaneous Petitions Nos. 312 of 1864 and 459 of 1868, applied to the Civil Court of Cuddalore for execution of the decree in Original Suit No. 1 of 1858 on the file of that Court, claiming mesne profits from Fasli 1268 to 1274. The decree in Original Suit No. 1 of 1858 decreed only the mesne profits asked for in the plaint, viz., mesne profits for the year 1858. The Civil Judge, however, in execution awarded mesne profits as asked for.

The defendant appealed on the grounds that

The mesne profits in question were neither asked for in the plaint, nor awarded to the plaintiff in the decree. That, therefore, the Civil Judge had no jurisdiction to award them under Section 11 of Act XXIII of 1861.

Sanjiva Rau for the appellant.

Miller for the respondent.

The Court delivered the following

JUDGMENT :—In this case the mesne profits awarded by the decree extended only to what was asked for in the plaint, viz., mesne profits for the year 1858. As mesne profits were asked for, the Court, in awarding them for the year 1858, might, under Section 196 of the Code of Civil Procedure, have gone

(a) Present :—Morgan, C. J. and Innes, J.

1872. June 28. C. M. R. A. No. 182 of 1872.

on to award them for subsequent years and until the date of delivery of possession. But it did not do so—And the case at IV M. H. C. R. page 257, is an authority that in execution mesne profits could only be granted within the plain terms of the decree. We do not see that the circumstance that mesne profits were in that case not awarded at all, distinguishes it in principle from the present case, in which they were awarded for one year; because the decision of the Court in that case was founded on the construction of Section 11, Act XXIII of 1861, and the Court, reading that Section with Sections 196 and 197 of Act VIII of 1859, held that it was clear that the words relating to mesne profits subsequent to the date of the suit must be limited strictly to mesne profits made payable by the decree in the suit. As the mesne profits in regard to which this appeal is made were not made payable by the decree, they could not be awarded in execution. We must, therefore, reverse the order of the Civil Judge, but without costs.

Appellate Jurisdiction. (a)

Special Appeal No. 150 *of* 1872.

RA'JAGOPA'LA A'YYANG'AR............*Special Appellant.*

THE COLLECTOR of CHINGLEPUT and another......................*Special Respondents.*

Plaintiff, a Mírásidár, purchased certain land in 1850 which he allowed to lie waste from 1853. In 1866, on the application of the 1st defendant who was also a Mírásidár to the 2nd defendant, the local Revenue Authority, the land was granted to 1st defendant and made over to his possession. Plaintiff was admittedly in arrears of kist. In a suit by plaintiff to recover the land it was contended that non-cultivation and non-payment of rent for a considerable time warranted the Revenue Authorities in entering upon and disposing of the land : *Held*, in Special Appeal, that plaintiff's tenancy could only be determined by his resignation or abandonment of his holding, or by the procedure laid down in Act II of 1864 : that the letting land lie fallow does not necessarily lead to the inference of abandonment, and that, in the present case, plaintiff, not being found to have abandoned the land, had been ejected in a manner which the law does not recognize.

S. A. No. 139 *of* 1858 (Sadr Rep. 1859, p. 21) ; *S. A. No.* 482 *of* 1860 (Sadr Rep. 1861, p. 112) ; *S. A. No.* 839 *of* 1861 (I M. H. C. R. 12) ; *R. A. No.* 20 *of* 1863 (I M. H. C. R. 407) and *R. C. No.* 3 *of* 1868 (4 M. H. C. R. 153) considered.

1872. August 16. S. A. No. 150 of 1872.

THIS was a Special Appeal against the decision of E. B. Foord, the Civil Judge of Chingleput, in Regular Appeal No. 116 of 1870, reversing the decree of the Court of the District

(a) Present :—Innes and Kernan, JJ.

Munsif of Chingleput in Original Suit No. 244 of 1866 on the file of the District Munsif of Karungúli.

1872. *August* 16. *S. A. No.* 150 *of* 1872.

Ananda Charlu for the special appellant, the plaintiff.

The *Government Pleader* for the Collector of Chingleput.

The facts found and the arguments of counsel are set forth in the following

JUDGMENT :—This was a suit to recover a piece of land which had been taken from plaintiff's possession by 2nd defendant (a Deputy Tahsildár) and made over to the possession of 1st defendant. The admitted facts seem to be that the land had been left long uncultivated, and that on the application of the 1st defendant to the 2nd defendant, the local Revenue Authority, the land was granted to him and made over to his possession.

The District Munsif found, on the evidence, that the plaintiff had purchased the land at a Court sale in the year 1850, and that at the date of the cause of action he had left it uncultivated for 13 years, or from 1853. He went on to consider whether the proprietary right was lost by allowing the land to lie fallow. This question he decided in the negative, and he then came to the conclusion that the Revenue Authorities could not, at their pleasure, give the land of one to another, on the mere ground that it had been left uncultivated. That it was open to them, during the period mentioned, to have entered the land in the plaintiff's pattah and received from him the revenue due upon it, but that they had neglected to do this and could not, therefore, justify the delivery of the land to 1st defendant by the neglect of plaintiff to pay the revenue. He therefore gave judgment for plaintiff.

The Civil Judge considered that the question was whether plaintiff forfeited his right to the land by neglecting to pay its assessment, his liability to pay being admitted. He reversed the decision of the Munsif, being of opinion that the 2d defendant was competent, in the protection of the public revenue, to grant the land to the 1st defendant. The Civil Judge was guided in the decision he came to by the Reports of Cases at pages 12 and 407 of Vol I of the High Court Reports ; which he considered applicable to mírási as well as ordinary pattah

1872. August 16. S. A. No. 150 of 1872.

land in a case like the present, in which both the competing parties, plaintiff and 1st defendant, are míráśidárs.

In Special Appeal we have to consider the general question of whether the Revenue Authorities could legally make over the land to 1st defendant.

We thought the case of such importance that the Government ought to be represented, and we directed the Collector to be made a party.

Ananda Charlu appeared for the special appellant. Mr. Handley, the Government Pleader, appeared for the Collector. He admitted the plaintiff's possession, but in support of the decision appealed from quoted the Sadr Court's decisions in *Special Appeal No.* 139 *of* 1858, at page 21 of the Vol. for 1859; in *Special Appeal No.* 482 *of* 1860, at page 112 of the Volume for 1861; also the cases at pages 12 and 407 of 1 M. H. C. R. and at page 153, 4 M. H. C. R.

Mr. Handley said that these cases showed that actual abandonment of the land need not be found, but that cessation of cultivation for a considerable time is all that is necessary to warrant the authorities in entering upon and disposing of the lands.

In the first of these cases the land had been left waste by plaintiff for 12 or 13 years, and in 1853 the defendant, who said he had purchased it of plaintiff, obtained a pattah for the land. The evidence of purchase was disbelieved, and the Civil Judge and District Munsif awarded the land to plaintiff. The Special Appeal was dismissed by the Court of Sadr Adálat, the Judges (Hooper, Strange and Phillips) observing that "the Collector was not warranted in issuing a pattah to "the 1st defendant without giving plaintiff, as the ancient "occupant, the opportunity of cultivating the land, or ob-"taining from him his consent that it might be assigned to "the defendant." In the next case (*Special Appeal No.* 482 *of* 1860) the suit was to recover a plot of garden land said to be the property of the plaintiff, who had, however, abandoned it for some years, after which it was granted by the Zamindár to the defendants. The Principal Sadr Amin, differing from

the Munsif and following the decision just referred to, gave judgment for plaintiff. In Special Appeal the Judges (Phillips and Frere) took a distinction between this and the former case.

They said, "in that suit the defendant pleaded purchase "from the plaintiff and thus acknowledged the existence of his "title up to the date of the alleged sale, but failed to establish "this sale by any sufficient proof. It has been repeatedly held "by this Court that, as a general rule, lands which have been "abandoned and left waste by the original cultivators are at "the disposal of the Revenue Authorities, whom the Zamin-"dár in this case represents." Reading these two cases together, it results that as the law stood at the date of those decisions, so long as the occupant had not absolutely abandoned his land so as to leave it to be administered by the State as a thing *publici juris*, the Revenue Authorities had no power by mere delivery, or by grant of a pattah, to transfer the possession of it to another.

The report of the case in 1 M. H. C. R. 12 is very short and meagre as to the facts found, but as the Judges (Strange and Frere) expressly refer to the decision in *Special Appeal No.* 482 (just noticed) and base their decision upon it, it is fair to conclude that their ground for reversing the decisions of the Courts below, was the fact that plaintiff had abandoned his title to the land. In the case at 1 M. H. C. R. 407, the plaintiff was an ordinary pattahdár and was expressly found to have abandoned the land, and the judgment of the High Court affirming the decision of the Civil Judge, which dismissed the plaintiff's claim, went expressly upon that ground. The case at 4 M. H. C. R. 153, was also quoted by Mr. Handley to show that a mírásidár, as the plaintiff is, holds an hereditary tenancy under Government, determinable on default in payment of the assessment. That case, however, is not an authority for that proposition. The Small Cause Court had found as a fact that the plaintiff was a mírásidár, and informed the High Court of the meaning of the term mírásidár in Tanjore. But the decision of the High Court had only to deal with the question of whether such a tenant could sub-let, and this was the only question decided. Taking it, however, that the rights of a mírásidár are at least not less extensive than what is here

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expressed, we do not think that the case for the defendant is much advanced by it. In a certain event which, it is conceded, has taken place, the tenancy is determinable, not determined, and the question is in what way determinable. The plaintiff contends in special appeal that the Revenue Authorities can only determine his tenancy under Madras Act II of 1864. Mr. Handley says they may determine it by re-entry. Now the plaintiff is admittedly in arrears, and we have only to look to Madras Act II of 1864 to see what course is lawfully open to the Collector in such a case. After certain formalities have been complied with, the land may be brought to sale and the new purchaser let in. There must first be a demand, to be followed by an attachment if not complied with, and intermediately between that and the ultimate sale, the Collector may enter to *manage.* He does not enter to determine the tenancy, nor has he any authority to do so. It would be a strange conclusion to arrive at that Act II of 1864 is only applicable to those cases in which the Collector is proceeding to collect arrears, and that if he chooses to forego arrears, he can at once enter and make over the land to another person; that is, that a tenant who is not formally called upon to pay arrears is placed in a worse position than one who has notice to pay them. The tenancy can, in our opinion, only be determined by the resignation of the tenant or his abandonment of his holding, or by the course of proceedings laid down in Act II of 1864. In the decisions of the Sadr Adálat and those of this Court, the basis of each decision in favor of the action of the Revenue Authorities was the fact of abandonment of his holding by the ryot or mírásidár.

Abandonment and resignation are, of course, on the same footing, except that the fact of abandonment must generally be a matter of mere inference, and the Revenue officer who acts on the assumption of it necessarily does so at his peril. The letting land lie fallow does not necessarily lead to the inference of abandonment, because it is susceptible of explanation in a hundred other different ways. And it would be very harsh to hold that a proprietor, because he exercises his right of abstaining from cultivating his land, must on that account be taken to have abandoned it. In the present case plaintiff is

not found to have abandoned the land, and he has been ejected in a manner which the law does not recognize. 1872. August 16. S. A. No. 150 of 1872.

The decision of the Civil Judge should be reversed and that of the District Munsif restored.

The special appellant is entitled to his costs in this and the Lower Appellate Court.

Appeal allowed.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 221 *of* 1872.

VENKATARA'MANA HODAI.........*Appellant.*

BAPANNA PAI.....................*Respondent.*

A suit was compromised by a rázináma which required that a decree should be passed in conformity with its terms. The Munsif, instead of passing a regular decree, endorsed an informal order on the rázináma, and five years afterwards, upon an application for execution, the Munsif made a formal decree and ordered its execution. The Civil Judge considered this procedure erroneous and ordered that the decree should not be acted on. *Held*, that it was competent to the Munsif to make a decree in pursuance of the rázináma upon the application of the party interested even after an interval of five years.—And that, the decree having been properly made, the Judge had no authority to direct that it should not be acted on.

THIS was an appeal against the order of the Civil Court of Mangalore, dated the 16th March 1872, passed on Miscellaneous Petition No. 144 of 1872, presented against the order of the District Munsif of Kandapúr, dated 12th January 1872. 1872. August 16. C. M. S. A. No. 221 of 1872.

The appellant was plaintiff in a Suit No. 20 of 1862 in the Court of the Munsif of Kandapúr, in which the respondent and another were defendants. The parties having compromised the suit, a rázináma was presented to the Court and the Munsif endorsed an informal order on it, but made no decree. Plaintiff, by Petition No. 259 of 1871, applied for execution, upon which the Munsif made a decree according to the terms of the rázináma and ordered its execution. On appeal the Civil Judge said—" In this case a compromise was filed but no decree prepared on it. After several (five) years had passed, and objections had been raised against the compromise, the present Munsif prepares a decree. I consider this was erroneous, and that it should not be acted on, but the parties be referred to a suit."

(a) Present :—Morgan, C. J. and Kindersley, J.

1872. August 16. C. M. S. A. No. 221 of 1872.

The plaintiff appealed on the grounds that the decree of the Munsif was a perfectly legal one: that if he had no authority to pass a decree in accordance with the terms of the rázináma, then that decree ought to have been appealed against; that the Civil Judge had no authority to set it aside in a summary proceeding, and that the defendant himself did not originally object to the enforcement of the rázináma as a decree.

Sanjiva Rau for the appellant.

The Court delivered the following

JUDGMENT :—In this case it appears that a suit was compromised by a rázináma, which required that a decree should be passed in conformity with its terms. The District Munsif, instead of passing a regular decree, endorsed an informal order on the rázináma; and five years afterwards, upon an application for execution, the District Munsif made a formal decree, and gave orders for its execution.

Upon appeal in execution the Civil Judge considered this procedure erroneous, and ordered that the decree should not be acted on, but the parties be referred to a suit.

We think that it was competent to the District Munsif to make a decree in pursuance of the rázináma, on the application of the party interested, even after an interval of five years. And the decree having been properly made, the Judge had no authority to direct that it should not be acted on. We must, therefore, reverse the order of the Civil Judge and remit the record to the Original Court for execution. The respondent must pay the appellant's costs in this and the Lower Appellate Court.

Appeal allowed.

Appellate Jurisdiction. (a)

Regular Appeal No. 34 of 1872.

MANUAL FEUVAL......................*Appellant.*

SANAGAPALLI LATCHMIDE'VAMMA and another.................... } *Respondents.*

Plaintiff purchased at a sale by the District Munsif's Court of Guntúr, held on the 22nd of December 1868, the interest of one F. G. in a cotton screw at Guntúr. Previous to this, on the 31st July 1867, the husband of the 1st defendant in the present suit filed a plaint, No. 16 of

(a) Present :—Kernan and Kindersley, JJ.

1867, in the Civil Court of Guntúr, against the representatives of F. G. (who was then dead) praying to be declared entitled to be treated as mortgagee of the shares of F. G. in that and another screw for Rupees 1,696-9-0, and that the amount might be raised by sale of those shares. Issues were settled, the 4th of which was—"Was there a tangible mortgage of real property or shares in real property"—And the decree, made on 30th September 1869, found this issue in the affirmative and declared that the amount sued for should be paid from the aforesaid shares hypothecated to the plaintiff in that suit. At a sale in execution of this decree the share of F. G. in the screw at Guntúr was purchased by 2nd defendant (in the present suit) on the 18th of February 1870. The present plaintiff objected to the sale and was referred to a regular suit. Accordingly he brought the present suit to set aside the decree in No. 16 of 1867 as regards the share of F. G. in the screw at Guntúr, to cancel the attachment and sale to 2nd defendant and for possession of the share. 1st defendant pleaded that plaintiff at the date of his purchase had notice of the pendency of the Suit No. 16 of 1867 and of the mortgage claim. The plaintiff denied the fact of the mortgage and its regularity and issues were framed, the 1st of which was—"whether plaintiff knew that the Suit No. 16 of 1867 was under hearing when he bought the ⅓ share, and that there might be declared a hypothecation to the late husband of the 1st defendant in this suit." The Civil Court, treating the claim of the plaintiff in No. 16 of 1867 as a mortgage, held that, as it was prior in point of time to the sale under the Munsif's decree it should prevail against plaintiff's claim—even though plaintiff had not notice. The Court also found that plaintiff had notice. Upon appeal, *Held*, that as the purchase made by the plaintiff was made while the Suit No. 16 of 1867 was pending, in which a mortgage was alleged and payment was prayed out of the property, the plaintiff was bound by the decree made therein, whether he had or had not notice, nor could he in any way question that decree.

THIS was a regular appeal against the decree of R. B. Swinton, the Civil Judge of Guntúr, in Original Suit No. 1 of 1871.

1872. *June 27.* *R. A. No. 34 of 1872.*

Plaintiff (the appellant) sued Latchmidévamma (widow of one Sanagapalli Venkatáchellam) and another, to have cancelled the decree in Suit No. 16 of 1867, on the file of the Civil Court of Guntúr, as far as it affected the one-third share of the late F. Guidamore which was obtained by the late husband of the 1st defendant, and to have cancelled the attachment and sale of the said one-third share to the 2nd defendant, and to be put in possession of the same.

The plaintiff stated that the late F. Guidamore and himself and others had shares in the screw house erected at Guntúr in the yard of one Kidambi Venkata Charlu, and that the one-third share of Mr. Guidamore was purchased on the 22nd December 1868 by the plaintiff's company, of which company the plaintiff only survived; that the late husband of the 1st defendant brought Suit No. 16 of 1867, for a debt due by F.

1872. June 27. R. A. No. 34 of 1872.

Guidamore, to which suit the plaintiff was no party, and obtained a decree on the 30th September 1869, in execution of which the one-third share the plaintiff had purchased was taken in execution.

The 1st defendant answered that her late husband purchased the whole of the screw and paid Rupees 4,500; and gave one-third share in it to the firm of Fruval, Duminy and Co., and upon the late Mr. Guidamore requiring a share, he also gave him a share, but subject to a mortgage to the defendant of it, until Mr. Guidamore paid fully for it; that Mr. Guidamore died before the debt was discharged, and the 1st defendant's husband brought a Suit No. 16 of 1867 for the recovery of the money advanced; and that although this plaintiff knew all the circumstances connected with this suit, the plaintiff did in December 1868 purchase the share of Mr. Guidamore, improperly sold at a Court auction held by the District Munsif of Guntúr at the requisition of the District Munsif of Coconada, and that the 1st defendant's husband intimated the fact of his mortgage while the sale was going on, and that the plaintiff bought it with full knowledge, and that the mortgage right which was decreed in September 1869, could not thereby be affected.

The 2nd defendant answered that the plaintiff purchased the one-third share in the screw knowing that it was mortgaged to the husband of the 1st defendant, and that a suit was pending in the Civil Court; and that he (2nd defendant) after the decree of the said Court, on the 18th February 1870, purchased Mr. Guidamore's one-third share and obtained a sale certificate, and that plaintiff then being silent now brought this suit.

The following issues were framed—

I. Whether or not plaintiff knew that Suit No. 16 of 1867 was under hearing in the Civil Court of Guntúr when he purchased the one-third share, and that by a decree in that suit there might be declared to be a hypothecation to the 1st defendant's husband of the one-third share of the screw.

II. Whether he ought to have "claimed," under Section 73 of the Civil Procedure Code, some interest in the subject-matter of the suit.

III. Whether he ought to be heard now to allege that there was no mortgage as decreed.

The judgment of the Civil Judge contained the following :—

" I have read from the records of the execution in No. 16 of 1867, a petition dated 16th February 1870 by Mr. Fruval, alleging that the plaintiff, in attaching the defendant's property, caused also to be attached the share which he had purchased at the Munsif's Court auction, and alleging that as a resident of Masulipatam he was not aware of the sale proclamation, and requesting the release of the property. By an order made on the 17th, the petitioner is referred to a regular suit, as the objection ought to have been made earlier.

The case reported at page 434 of Vol. IV of the Madras High Court Reports has been cited for the position that notice was not necessary to the plaintiff of the prior mortgage.

A further issue is raised " whether or not notice of the prior mortgage was necessary."

Under Section 145 of the Civil Procedure Code, this suit may be disposed of after having heard the pleaders; I find that notice was not necessary, and that from the very strong probability of the case; from the absence of Mr. Fruval after a suggestion at last hearing that he should be here; from the presence of his partner Mr. Vally,—the plaintiff knew that there was then, when he made the auction purchase, a suit in this Court founded on an hypothecation of the share of Mr. Guidamore; a decision on the other issues is not necessary. The suit is dismissed with costs."

The plaintiff appealed on the following grounds.

1. The plaintiff's rights are not affected by the decree in Original Suit No. 16 of 1867, on the file of the Civil Court of Guntúr, to which he was no party.

2. There ought to have been an investigation in this suit as to the mortgage or lien on the property in dispute alleged by the defendants and denied by the plaintiff.

3. The purchase of the property in dispute by the 2nd defendant in execution of the decree in the said Original Suit

1872. June 27. R. A. No. 34 of 1872.

No. 16 of 1867 is invalid against the prior purchase by the plaintiff in execution of a prior decree.

Handley for the appellant, the plaintiff.

J. H. S. Branson for the respondents, the defendants.

The Court delivered the following

JUDGMENT :—The plaintiff appeals against the decree of the Court below, dated 16th September 1871, which dismissed this suit. This suit was filed 28th January 1871, praying that a decree in No. 16 of 1867 may be set aside, as regards the one-third share of the late Mr. F. Guidamore in a cotton screw at Guntúr, and to cancel the attachment and the sale in that suit to the 2nd defendant, and for possession of the same one-third share.

The plaintiff purchased at a sale by the District Munsif's Court of Guntúr, held on the 22nd of December 1868, the interest of Mr. Guidamore in the screw at Guntúr. [What is called in the case "the screw" is in fact certain land, with buildings on it, and in which heavy cotton machinery is placed, for screwing cotton bales. No question has been raised, whether the "screw" is not of the nature of real property. It has been so treated by the parties.]

Before the sale to the plaintiff, that is on the 31st of July 1867, the husband of the 1st defendant in this suit filed a plaint, No. 16 of 1867, in the Civil Court of Guntúr against Charles Guidamore, the brother of F. Guidamore (who was then dead), and the Administrator General who had obtained administration to him—praying to be declared entitled to be treated as mortgagee of F. Guidamore's share in that screw and another at Masulipatam for Rupees 1,696-9-0, and that the amount might be raised by sale of that share.

Issues were settled, the 4th of which was :—"Was there a tangible mortgage of real property or shares in real property?" That suit was duly prosecuted and a decree was made therein on the 30th of September 1869, finding the 4th issue in the affirmative, and declaring that the amount sued for should be paid from the two shares of the said screws (including the Guntúr screw) hypothecated to the plaintiff in

that suit. After that decree, and at an auction sale in execution thereof, the one-third share (in question) in the Guntúr screw was, on the 18th of February 1870, purchased by the 2nd defendant for 610 Rupees. Before the sale, plaintiff in this suit objected thereto by Petition No. 179 of 1870, and, by an order of the 17th of February 1870, he was referred to a regular suit. Accordingly this suit was brought.

1873. *June 27.* *R. A. No. 34 of 1873.*

In this suit the 1st defendant, the representative of plaintiff in Suit No. 16 of 1867, filed a statement on the 21st of August 1871, stating the agreement for mortgage by F. Guidamore, and the Suit No. 16 of 1867 and decree and sale therein, and that plaintiff in this suit had notice at the date of his purchase of the existence of the Suit No. 16 of 1867 and of the claim of mortgage affecting the screw.

The plaintiff denied the fact of the mortgage and its regularity and issues were framed, the first of which was—"Whether plaintiff knew that the Suit No. 16 of 1867 was under hearing when he bought the one-third share, and that there might be declared a hypothecation to the late husband of the 1st defendant in this suit."

The Court below appears to have treated the claim of the plaintiff in No. 16 of 1867 as a mortgage, independent of the decree in that suit, and held that, as it was prior in point of time to the sale under the Munsif's decree it should prevail against plaintiff's claim—even though plaintiff had not notice of such prior mortgage. In that view the Court referred to the case *Regular Appeal No.* 40 *of* 1869 (*a*) deciding that an instrument of mortgage, giving a right of having the land made available for payment of the debt, being prior in point of time to a *bonâ fide* purchase for value without notice, prevailed against the innocent purchaser.

The Court also found on the issues that the plaintiff in this suit had notice. Plaintiff has appealed on three grounds; 1st. The plaintiff's rights are not affected by the decree in Original Suit No. 16 of 1867 on the file of the Civil Court of Guntúr, to which he was no party.

2nd. There ought to have been an investigation in this suit as to the mortgage or lien (on the property in dispute) alleged by the defendants and denied by the plaintiff.

(*a*) 4 M. H. C. R. 434.

1872. June 27. R. A. No. 34 of 1872.

3rd. The purchase of the property in dispute by the 2nd defendant, in execution of the decree in the said Original Suit No. 16 of 1867, is invalid against the prior purchase by the plaintiff in execution of a prior decree.

The record of the Suit No. 16 of 1867 was called for and produced on the hearing before us.

The argument for the appellant was that at the time of the sale under the Munsif's decree, there was not, either in fact or in law, any mortgage affecting the one-third share of Guidamore in the screw, and that the sale under that decree, being prior to the decree in No. 16 of 1867, should prevail, and that plaintiff was entitled to possession as prayed, even though he should not be entitled to set aside the latter decree and sale thereunder. It was contended that as, admittedly, there was not any instrument of mortgage of the one-third of the screw, and inasmuch as the Suit No. 16 of 1867 merely alleged an agreement for a mortgage, that the sale by the Munsif was valid at the time, and could not be affected by the subsequent decree, which found that there was a mortgage and directed a sale, nor could the plaintiff as he was no party to it. Plaintiff contended that the decree merely gave effect as from its date to an agreement for mortgage, but did not and could not declare that there was a mortgage when that suit was instituted, and that, assuming plaintiff had notice of that suit before he purchased, that such notice was not notice of any charge to be made effectual by a decree, and the case of "*Seth Sam,*" 6 M. H. C. R. 75, was relied on to support that contention. Plaintiff further contended that there should be an investigation in this suit whether there was a mortgage by Guidamore of his share of the screw. The plaintiff further insisted that the evidence of notice to him of the Suit No. 16 of 1867 was not sufficient to support the finding of notice in fact.

The defendants, while contending that the judgment below was right upon the ground stated by the Judge in his judgment, further contended that the purchase made by the plaintiff was made while the Suit No. 16 of 1867 was pending, in which a mortgage was alleged and payment was prayed out of the property; and that whether he had or had not

notice of that suit, he was bound by the decree made therein. We are of opinion that in this latter contention the defendants are clearly right. The doctrine of "lis pendens" no doubt applies to this country. See *R. A. No.* 28 *of* 1870, 6. M. H. C. R. 75: *R. A. No.* 1 *of* 1871, 6. M. H. C. R. 234. In reference to this doctrine Sir W. Grant in *Winchester* v. *Paine*, 11 Ves. 194, observes, "He who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. It is to them as if no such title existed."

1872. *June* 27. *R. A. No.* 34 *of* 1872.

No doubt there must be a specific claim made in the suit, to affect the particular subject sought to be affected by the "lis pendens." *Jennings* v. *Bond*, 2 J. & L. 741, and cases there referred to by Sir E. Sugden (Lord St. Leonards afterwards); *Tyler* v. *Thomas*, 25 Beav. 47. The observation of Sir W. Grant was directed to such a state of facts.

Now, in this case, the plaintiff in No. 16 of 1867 claimed to have a mortgage on the one-third share of the screw, and prayed for payment of the amount out of that property, and, pending the decision, the plaintiff in this case purchased under a decree by the Munsif against the defendant in that suit. The purchaser under that decree took only what the defendant could give, and subject to any decree to be made in No. 16 of 1867 against the defendants therein and the land sought to be charged in respect of the alleged mortgage of one-third of the screw.

The fact, if it was so, that the plaintiff had not notice of the suit, is not material in this country, as there is not as yet any registration here of "lis pendens," and the law, as it stood in England before the 2 & 3 Vict. c. 11, applies. The doctrine of "lis pendens" does not depend upon notice, but upon the ground "that it is necessary to the administration of justice that the decision of the Court in a suit should be binding; not only on the litigant parties, but on those who derive title from them 'pendente lite,' whether there is notice or not." *Bellamy* v. *Sabine*, 1 DeG. & J. 578: *Seth Sam's Case*, supra.

1872. June 27. R. A. No. 34 of 1872.

The plaintiff is not entitled to question the decree in Suit No. 16 of 1867, he having bought "pendente lite," and therefore can have no enquiry whether there was in fact such a mortgage as found in that suit, or whether the effect of the decree in that suit was to establish a mortgage as existing in the view of a Court of Equity, as from that decree, and not to decide that such mortgage existed prior to his purchase.

In the view we take it is not necessary to consider what should have been the priorities between the plaintiff and the 2nd defendant, if no suit had been pending. Therefore we do not refer to the principle contained in 4 M. H. C. R. 434.

We dismiss the appeal with costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 46 *of* 1872.

SINIA TE'VAR .... *Appellant.*

RAJAH STRIMANTA RANGASA'MI AIYANGA'R BA'HA'DU'R.................................... *Respondent.*

Decrees on two specially registered bonds were obtained against plaintiff under Section 53 of the Registration Act XX of 1866. He petitioned the Civil Court, under Section 55, to set aside these decrees, on the ground that the bonds were executed on consideration of something to be done by the obligee, who had wholly failed to perform his part. The Judge dismissed the petitions, because he thought the matter was a more proper one for investigation in a regular suit. His successor dismissed the suit when brought, because, in his opinion, it did not lie. *Held*, on appeal (by the majority of the Court) that no suit lay. The effect of Sections 52 to 55 is to make a decree under them of precisely the same validity as any other decree, to make it enforceable by the same process, but to render it impeachable on the special grounds referred to in Section 55. *Held* also, that the matters alleged were not such as, if proved, would have justified the setting aside of the decree. The special circumstances must be such as to show a vice in the mode in which the contract to submit to decree and the special registration were obtained, and an infirmity in the original obligation will not do.

1872. August 23. R. A. No. 46 of 1872.

THIS was a regular appeal against the decision of F. M. Kindersley, the Civil Judge of Tanjore, in Original Suit No. 20 of 1871.

The suit was brought to set aside two decrees passed summarily against the plaintiff under Section 53, Act XX of 1866.

(a) Present :—Morgan, C. J., Holloway and Innes, JJ.

1872.
August 23.
R. A. No. 46
of 1872.

The plaint alleged that defendant had offered to use his best endeavours, on behalf of Kámákshi Bayi Sahiba, to establish the adoption of one Surfoji Sahib as the son of the late Rájah of Tanjore, and to recover the ráj for him, and that defendant also promised that the Mocassa villages should be leased to plaintiff. In return for this the plaintiff, on 16th August 1869, executed to defendant two specially registered bonds for Rupees 26,767-12-3 and Rupees 37,225, respectively, the said bonds being executed for no consideration paid to plaintiff, but as a guarantee and security by plaintiff, on behalf of Kámákshi Bayi Sahiba, that defendant should be reimbursed for any expenses he might incur in prosecuting his endeavours to establish the adoption and recover the ráj. That defendant made no endeavour to establish the adoption or recover the ráj, and that, therefore, the decrees passed summarily under Section 53 of the Registration Act of 1866, should be set aside.

The defendant pleaded that the bonds recited consideration, and that the plaintiff was concluded by the terms of the bonds themselves, and further that the plaint was false. He also objected to the order passed by the Civil Court on Miscellaneous Petitions 228 and 229 of 1871 (petitions presented by plaintiff under Section 55 of the Registration Act) as illegal, the Civil Court having stayed execution without setting aside the decrees, and without any special circumstances.

Civil Petitions Nos. 228 and 229 of 1871, were applications by plaintiff to the Civil Court of Tanjore, praying that the decrees in Special Registration Suits Nos. 22 and 23 of 1870 might be set aside under Section 55 of the Registration Act XX of 1866. They alleged the same facts as the plaint in the present suit and were rejected, the then Civil Judge, in the order of rejection, making the following observations:—"The question which I have now to consider is, whether upon these averments I should hold any enquiry, or whether it would not be more proper for me to make some order suspending the operation of the decree, and refer one or other of the parties to a regular suit. It seems to me that the latter is the proper course, and that it is the petitioner and not the plaintiff (in the registration suits) who should be left to bring

1872. August 23. R. A. No. 46 of 1872.

the suit. It could never have been the intention of the Legislature that any substantial issue like that now raised should be decided summarily without an appeal......... There seems to be a substantial and a *bonâ fide* question to be decided, and it should be determined in a regular suit once for all, subject only to the ordinary right of appeal. I might, of course, say that this is a special circumstance warranting the setting aside of the decree altogether, but it seems to me that would throw an undue burden on the plaintiff, who has already had to pay one-fourth of the full stamp on which the plaints will have to be written. The length of time which intervened between the original instruments and their renewal and special registration is a very strong point against the petitioner's contention, and the special registration itself is almost enough, in my opinion, to relieve plaintiff from any further duty and shift on to petitioner the burden of suing........ The existence of the decrees will not prejudice petitioner in any way, for I conceive that an action will clearly lie to set them aside. Nothing has been shown to the contrary, and there has been no cause of action heard or determined, nor indeed anything which can be called a suit between the parties. I therefore order that these applications be, and the same hereby are, rejected, without prejudice to petitioner's right to bring a regular suit, and that further execution of the decrees in the so-called Original Suits Nos. 22 and 23 of 1870 be stayed for three months, provided only that nothing in this order shall be construed as affecting plaintiff's right to attach any property belonging to petitioner."

Accordingly the present suit was brought. The Civil Judge delivered the following judgment, dismissing the suit, at the hearing for the settlement of issues:—

"Before going into the merits of the case, there is, I think, an objection which is fatal to the plaintiff's case: and that is that no suit will lie to set aside the decrees passed summarily under Section 53 of the Registration Act of 1866. Section 55 of that Act seems to me to lay down the procedure which is to be followed when the decrees are sought to be set aside; and no other procedure is, in my opinion, allowable. The decrees, though passed summarily, have all the

effect of regular decrees, and therefore conclude the judgment debtor, unless he can show special circumstances under Section 55.

1872. August 23. R. A. No. 46 of 1872.

The parties when specially registering bonds agree that the bonds shall be summarily enforced according to the provisions of the Registration Act, and part of those provisions are that there shall be no appeal from the decree or order of the Court. The plaintiff's counsel now argues that if plaintiff is not allowed to sue to set aside the decrees, and if the Court, under Section 55, refuse to set them aside, he is debarred from all remedy; that is to say, he seeks, by bringing a regular suit, to break through and render null and void the special provisions of the Registration Act to which he voluntarily made himself subject.

The plaintiff's counsel further argued that the Civil Court had, in the orders passed on the Miscellaneous Petitions 228 and 229 of 1871, allowed plaintiff to bring this suit. Even if the order of the Civil Court were to that effect, it could not give plaintiff a right of action which he did not otherwise possess. But the order is merely an order rejecting the plaintiff's applications under Section 55, and stating that they are rejected without prejudice to any right the petitioner might have of bringing a regular suit, and the order does not decide the point whether plaintiff has such a right.

I think that to allow plaintiff to bring this suit, would be directly opposed to the provisions and intentions of Sections 52 to 55, Act XX of 1866, and that until the decrees are set aside under Section 55 of the Act, the plaintiff is concluded by them as much as if they were regular decrees, and is, therefore, precluded from bringing this suit; and for these reasons I dismiss this suit, but, under the circumstances of the case, the defendant not having taken this objection, and plaintiff having been doubtless misled by the Civil Court's order, I think each party should bear his own costs."

The plaintiff appealed upon the grounds that he was clearly entitled in law to sue to set aside the summary decisions passed against him, and that the Civil Judge had no authority to set aside the order of his predecessor granting permission to institute a regular suit.

1872. August 23. R. A. No. 46 of 1872.

The appeal was first heard on the 29th May 1872 by the Chief Justice and Mr. Justice Innes, and in consequence of a difference of opinion was referred to a Full Bench.

Ráma Rau for the appellant, the plaintiff.

Ananda Charlu for the respondent, the defendant.

The Court delivered the following

JUDGMENT :—In this case the former Judge dismissed an application under Section 55, because he thought the matter was a more proper one for investigation in a regular suit. His successor has dismissed that suit because, in his opinion, it does not lie. Even if that view is correct, it would probably be right to treat the present suit as a continuation of an investigation which was only interrupted because of the Judge's opinion as to the applicability of a suit. There are, therefore, two points.

1. Does a regular suit lie.

2. Are the matters alleged such as, if proved, would have justified the setting aside of the decree.

As to the first—In the opinion of the majority of the Court, the effect of the Sections 52 to 55 is to make a decree under them of precisely the same validity as any other decree, to make it enforceable by the same process, but to render it impeachable on the special grounds referred to in Section 55. The intent was, and the words effectuate it, to make a registered contract to pay money, with the registered contract to submit to a decree under the Act, a substitute for the ordinary securities afforded by regular procedure. To say that a regular suit lies because the case has not been heard and determined, is to overlook the fact that the object is to cause it to be determined without hearing. The effect is precisely the same as final judgment signed under 18 & 19 Vict. c. 67, or a decree under the corresponding Indian Act.

The second question is whether the decree so obtained is impeachable on the grounds on which it is sought by the present plaintiff to impeach it. The ground is that the bonds were executed on consideration of something to be done by the original plaintiff, who has wholly failed to perform his

part. This would, undoubtedly, if the matter had not proceeded beyond a contract, have been a sufficient defence, but it seems to the majority of the Court that an infirmity attaching to the original obligation is no more reason for setting aside a decree obtained under this Act than it would be for setting aside one obtained by the regular procedure. It seems to us that the Legislature have said :—You can use your own discretion as to registering, but if you do register a contract creating an absolute obligation to pay money, and you further register a contract that it shall be enforced against you without enquiry, judgment shall be given against you. We will not permit you to say that the obligation was not absolute but conditional, but if your assent to the registration itself has been procured by means which ought to invalidate the obligations flowing from those two contracts, we will hear you, and, under Section 55, leave the plaintiff to whatever remedy he can get by a suit in the usual form.

1872. *August* 23. *R. A. No.* 46 *of* 1872.

We are of opinion that the special circumstances must be such as to shew a vice in the mode in which the contract to submit to decree and the special registration were obtained, and that an infirmity in the original obligation will not do. We, therefore, dismiss the appeal, but in consequence of the difference of opinion, without costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 62 *of* 1872.

PONNAMBALA MUDALIYAR........................ *Appellant.*

VARAGUNA RA'MA PANDIA CHINNATAMBIAR... *Respondent.*

A suit brought for the removal of defendant from the management of certain charitable trusts on the ground of malversation was dismissed by the Civil Judge, because he considered that the provisions of Regulation VII of 1817 required that application should first be made in such cases to the Board of Revenue. *Held*, on appeal, that the Civil Judge was wrong. Regulation VII of 1817 is clearly intended to be supplementary of existing remedies, and the Courts had unquestionably jurisdiction in such cases prior to its enactment. The expression in Section 14 of the Regulation is not intended to limit the jurisdiction of the Courts to the cases contemplated in it, but rather to provide against the finality of erroneous orders that may be passed by the Board of Revenue under the Regulation.

THIS was a regular appeal against the order of F. C. Carr, the Acting Civil Judge of Tinnevelly, dated 9th December 1871.

1872. *October* 21. *R. A. No.* 62 *of* 1872.

(a.) Present :—Morgan, C. J. and Innes, J.

1872. October 21.

R. A. No. 62 of 1872.

Ráma Rau for the appellant, the plaintiff.

The facts sufficiently appear in the following

JUDGMENT:—This is a suit for the removal of defendant from the management of certain charitable trusts on the ground of malversation. The Civil Judge dismissed the suit because he considered that the provisions of Regulation VII of 1817 required that application should first be made in such cases to the Board of Revenue. In the appeal to the High Court, it is contended that an action lies in the ordinary Courts. It appears to us that the decision of the Civil Judge is wrong. The Courts had, unquestionably, jurisdiction in such cases prior to the enactment of Regulation VII of 1817, and there is nothing in the Regulation to deprive the Courts of their jurisdiction, while it gives the Board of Revenue the power, and imposes upon it the duty of interfering whenever it appears necessary to do so for the protection of charitable endowments. The Regulation is clearly intended to be supplementary of existing remedies. This was held by the late Sadr Court in the decision in *Special Appeal No.* 140 *of* 1857, reported at page 39 of the Volume of Reports for 1858, which was followed in another case at page 140 of the same year. The expression in Section 14 of the Regulation is not intended to limit the jurisdiction of the Courts to the cases contemplated in it, but rather to provide against the finality of erroneous orders that may be passed by the Board of Revenue under the Regulation. We must reverse the decision of the Civil Judge and remand the case for decision on the merits. The costs hitherto incurred will be provided for in the revised decree.

Appellate Jurisdiction. (a)

Criminal R. A. No. 250 *of* 1872.

NIDAMARTI NAGABHUSHANAM—*Prisoner.*

Prisoner killed his mother by beating and kicking her. The Session Judge found that the death resulted from brutal beating and kicking, but acquitted of culpable homicide because the violence was not such as the prisoner must have known to be likely to cause death.

Held, that this was no ground for acquitting of culpable homicide not amounting to murder : the question for the Judge was whether the act was done with the intention of causing bodily injury which was likely to cause death.

The Session Judge convicted the prisoner on the charge of causing death by a rash act. *Held*, that the section was wholly inapplicable.

'Culpable rashness' and 'culpable negligence' distinguished.

THIS was an appeal against the sentence of the Court of Session of Guntúr in Case No. 32 of the Calendar for 1872.

1872. *October* 24. *C. R. A. No.* 250 *of* 1872.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—In this case the prisoner killed his own mother by beating and kicking her. The Session Judge finds that the death resulted from a brutal beating and kicking, but he acquits of culpable homicide, because the violence was not such as the prisoner must have known to be likely to cause death. This is, it is manifest, no ground for acquitting of culpable homicide not amounting to murder. With such knowledge the act would be murder (Penal Code, Sec. 300, *2ndly*). The question for the Judge was whether the act was done with the intention of causing bodily injury which was likely to cause death. The Judge finds the brutal beating and kicking and dragging by the hair of the head of an old woman of 60 by a powerful man, who so acted without the smallest provocation. The causal connexion between the brutal assault and the death is found to be undoubted, but the Session Judge has convicted the prisoner under the new section of causing death by a rash act. This section is, in our opinion, wholly inapplicable to the facts of this case. Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow,

(a) Present:—Holloway and Kindersley, JJ.

1872. October 24. C. R. A. No. 250 of 1872.

but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (*luxuria*). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death. To say that because, in the opinion of the operator, the sufferer could have borne a little more without death following, the act amounts merely to rashness because he has carried the experiment too far, results from an obvious and dangerous misconception. We have had great hesitation whether we ought not to have remitted this case for a finding, whether the Session Judge and the assessors think that the act was done with such knowledge as to constitute culpable homicide. We are, however, averse to re-opening criminal cases unless absolutely compelled to do so, and as the evidence makes out, at least, a case of culpable homicide not amounting to murder, and a legal though inadequate sentence (*a*) has been passed, we are able, under Section 426 of the Procedure Code, simply to dismiss the appeal.

As this is neither a case of rashness nor of negligence, it becomes unnecessary to consider whether in any case a conviction under this new section can properly follow, where the rashness, or negligence, amounts to culpable homicide. It is clear, however, that if the words " not amounting to culpable homicide" are a part of the definition, the offence defined by this section consists of the rash or negligent act not falling under that category, as much as of its fulfilling the positive requirement of being the cause of death.

(*a*) Rigorous imprisonment for two years. [ED.]

Appellate Jurisdiction. (a)

Civil Miscellaneous Regular Appeal No. 330 *of* 1871.

JOSEPH VATHIAR OF NAZARETH......*Appellant.*

Petitioner, a Native Christian, applied, under Act XXVII of 1860, for a certificate of heirship to his deceased grandfather. The Civil Judge refused it on the ground that Native Christians are not "Hindus" within the meaning of the term as used in Section 331 of the Indian Succession Act X of 1865, and therefore that they are affected by the provisions of that Act and cannot proceed under Act XXVII of 1860. *Held*, upon appeal, that the order of the Civil Judge was right.

THIS was an appeal against the order of F. C. Carr, the Acting Civil Judge of Tinnevelly, dated the 21st September 1871, passed on Civil Miscellaneous Petition No. 1210 of 1870.

1872. *November* 27. *C. M. R. A. No.* 330 *of* 1871.

Petitioner, a Native Christian, applied under Act XXVII of 1860 for a certificate of heirship to his deceased grandfather. The Civil Judge made the following order, refusing the certificate—

"When this case came on for hearing, it was brought to my notice that the parties were Native Christian converts. It therefore appears to me that they are affected by the provisions of the Indian Succession Act X of 1865, which is made applicable to all residents in India except (by Sec. 331) "to intestate or testamentary succession to the property of any Hindu, Muhammadan, or Buddhist." These words must be held to be religious distinctions and not national distinctions, for the two latter words, 'Muhammadan' and 'Buddhist', are of only one meaning, and, by analogy, therefore, 'Hindus' must mean those of the Hindu religion. I am, therefore, of opinion that Native Christians cannot come to this Court under an Act which, except as far as it relates to Hindus, Muhammadans and Buddhists, is superseded. Mr. Sitaram, the petitioner's pleader, says that these people and the majority of the Native Christians still live in the Hindu manner, and their domestic relations are unchanged, and, by Act XXI of 1850, their rights of inheritance are in no way impaired by their change of religion; he also quoted the Privy Council judgment in the Abraham case, wherein it was laid down that a man may, if he pleases, abide by the old law although he has

(a) Present;—Morgan, C. J., Holloway and Kindersley, JJ.

1872 November 27. C. M. R. A. No. 330 of 1871.

renounced the religion, and urged that the parties in this case showed by their mode of life that they intended their rights still to be governed by Hindu law.

I was unable, however, to agree to this argument, because the *Abraham* case ruled that Act XXI of 1850 does not apply where parties have ceased to be Hindus in religion (9 Moo. I. A. 239) and, further, because the judgment of the Privy Council is dated February 1863, and therefore cannot affect the Indian Succession Act of 1865. Certificate refused accordingly."

The petitioner appealed.

The appeal was first heard on the 8th January 1872 and was re-heard before a Full Bench on the 22nd of the same month.

J. H. S. Branson for the appellant.

The Court delivered the following

JUDGMENT:—We are of opinion that the order of the Judge is right. We should have entertained some doubt upon this point save for the power contained in the Act of exempting such classes from its operation as to the Governor General in Council may appear fit.

The provisions of the Act both as to substantive law and procedure, seem exclusive.

Appellate Jurisdiction. (a)

Special Appeal No. 570 *of* 1872.

ARUNACHELLA TE'VAR......................*Special Appellant.*

VENCATASA'MI NAIK......................*Special Respondent.*

Plaintiffs, members of a Pagoda Committee appointed under Act XX of 1863, sued defendants for the recovery of Rupees 4,480-2-0. The plaint alleged that, in October 1865, the 1st defendant and another agreed to travel and collect subscriptions for the purpose of erecting a tower at the entrance of the pagoda in question, paying to the pagoda Rupees 130 a month during the period they should be engaged in the work, irrespective of the actual collections. That an agreement to this effect was executed, and 1st and 2nd defendants deputed to collect subscriptions. That both were engaged in the work until November 1869. That under the terms of the said agreement a sum of Rupees 6,500 was due, of which only Rupees 2,019-14-0 were credited in the accounts of the pagoda. That 1st and 2nd defendants, when required to account for the balance, informed the plaintiffs that they had paid to the 3rd defendant, the then manager of the said temple, Rupees 5,330, and that only Rupees 1,170 was due by them. The present suit was accordingly filed against the defendants for the sum of money due by them. The Court of first instance decreed against 3rd defendant alone. On appeal, the Civil Judge dismissed the suit as against the 3rd defendant on the ground of multifariousness, he having been sued on the ground of misappropriation, while the cause of action against the 1st defendant was breach of contract. *Held*, on Special Appeal, that the suit was not multifarious. That the 3rd defendant was properly included in the suit as a defendant and did not appear to have been prejudiced in his defence by the course of the proceedings.

THIS was a Special Appeal against the decision of J. D. Goldingham, the Civil Judge of Madura, in Regular Appeal No. 42 of 1872, reversing the Decree of the Court of the Principal Sadr Amin of Madura in Original Suit No. 176 of 1869.

1872. *December* 6. *S. A. No.* 570 *of* 1872.

The plaintiffs, as members of the Committee appointed for managing the affairs of the Pagoda of Dundayudapany at Palani, sued for the recovery of Rupees 4,480-2-0, being the balance of subscriptions collected by the 1st and 2nd defendants under the terms of a karar executed by the 1st defendant and another on the 27th October 1865, for erecting a gopuram, or tower, at the entrance of the said pagoda. The plaint alleged that, on the 27th October 1865, the 1st defendant and another named Subbaya Gúrukal undertook to travel to different parts of the country and collect subscriptions for the purpose above indicated, paying to the pagoda a sum of

(a) Present :—Morgan, C. J. and Kindersley, J.

1872. December 6. S. A. No. 570 of 1872.

Rupees 130 a month during the period they were engaged in the work, irrespective of the actual collections; that on their executing a karár or agreement to that effect, 1st defendant was formally deputed, in company with the 2nd defendant, to collect subscriptions, and both were engaged in the work till November 1869; that under the terms of the said karárnámah a sum of 6,500 Rupees was due from the date thereof to November 1869, of which only Rupees 2,019-14-0 was credited in the accounts of the pagoda; that the 1st and 2nd defendants on being required to account for the balance, informed the plaintiffs that they had paid to the 3rd defendant, the then manager of the said temple, sums amounting to Rupees 5,330; that only 1,170 Rupees was due by them up to the end of November 1869, and that the 3rd defendant having failed to account for the difference between the sums paid by the 1st defendant and the amount credited in the accounts of the pagoda, the suit was filed for the recovery of the same, as well as the sum of Rupees 1,170 due by the 1st and 2nd defendants.

The 1st defendant in his written statement denied the correctness of the plaint, or his liability to pay any portion of the amount claimed. He admitted having executed the karár referred to in the plaint and collected subscriptions from different parts of the country, but declared that he had paid to the 3rd defendant, on different dates, sums amounting to Rupees 5,513-4-0, and obtained from him receipts for the same; that the 3rd defendant alone was bound to account for the said Rupees 5,513-4-0, and that nothing was due from March to November 1869, as no journeys were undertaken to raise subscriptions during those months.

The 2nd defendant did not appear.

The 3rd defendant in his written statement pleaded that the plaintiffs as members of the Committee were not competent to bring this suit; that no leave had been obtained by them from the Civil Court authorizing them to institute this suit as required by Section 18, Act XX of 1863; that the plaintiffs' claim was barred by the Act of Limitation; that the causes of action against the 1st and 2nd defendants and the 3rd defendant were distinct, and should not have been included in the

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same suit; that the plaint did not disclose any cause of action against the 3rd defendant, nor the date when it accrued; that he (3rd defendant) with the permission of the plaintiffs remitted a portion of the amount due by the 1st defendant under the said karar and entered the same in the accounts as well as in the karar itself; that the karar having thus been modified, the plaintiffs had no right to claim the sum which the 1st defendant therein engaged to pay.

The Principal Sadr Amin held that Section 28 of the Civil Procedure Code, which was relied on by the 3rd defendant's pleader, did not prohibit the members of the Pagoda Committee, who were invested under Section 12, Act XX of 1863, with the powers exercised by the Board, or local agent, from filing suits; that Section 18, Act XX of 1863, did not apply to this case, as the 3rd defendant was no longer the manager of the temple; that the plea of misjoinder of causes must be overruled, because the object of the suit was to compel the defendants to account for sums collected by 1st and 2nd defendants and those received by the 3rd defendant. The Principal Sadr Amin further found that the terms of the karárnámah B were not altered subsequent to its execution, and that no part of the amount due under it by the 1st defendant was remitted by the 3rd defendant with the plaintiff's permission; that he (3rd defendant) was therefore bound to make good to the dévastánam Rupees 3,318-2 as shewn by the accounts, and that the 1st and 2nd defendants were not bound to make payments for the period in which they did not travel. For these reasons the Principal Sadr Amin adjudged the 3rd defendant to pay to the plaintiffs, for and on account of the said pagoda, the sum of Rupees 3,318-2, with proportionate costs and interest from date of decree to the date of payment at 6 per cent. per annum; rejected the rest of the plaintiffs' claim, and relieved the 1st and 2nd defendants from liability, charging plaintiffs with their costs.

From this decree the 3rd defendant appealed.

The Civil Judge delivered the following judgment—

"In this case there has been a complete misjoinder of the causes of action. The plaint is professedly brought upon a

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karárnámah executed by the 1st and 2nd defendants to the 3rd defendant, the late manager of the Palni dévastánam, and the relief asked for is that the sum due under the said karárnámah may be recovered either from the 1st and 2nd defendants, or from the 3rd defendant, on the ground that if 1st and 2nd defendants' statement that they paid the money to 3rd defendant be true, the 3rd defendant is answerable to the pagoda. It is quite clear that the course adopted by the Court below was irregular. The Judge should have asked plaintiffs—Do you claim from 1st and 2nd defendants on the ground of their breach of contract, or do you sue 3rd defendant on the ground of misfeasance?—For there is clearly no community of interest between these several defendants. The Principal Sadr Amin has found that the 1st and 2nd defendants have discharged all the sums due by them, and has saddled the 3rd defendant with the amount. The 3rd defendant appeals on the ground that he has been materially prejudiced by the action of the Court below, that he should be called upon to meet the evidence adduced by plaintiffs and not that adduced by his co-defendants, with whom, as I said before, he has no community of interest. I concur in this objection, which I notice was started in the Court below, for if you strike at 1st defendant's statement that he and 2nd defendant paid the money to the 3rd defendant, and the evidence adduced by them in support of their defence, there is nothing to show that 3rd defendant failed in carrying this sum to account, and that he is liable for his misfeasance. The case must, therefore, be taken as a suit brought, as alleged in the plaint, upon the karárnámah, for sums due under it by the 1st and 2nd defendants. The 1st and 2nd defendants have been relieved from liability by the decree of the Court below on the ground of their having discharged their debt to the institution, and as there is no cross appeal against this decree, it follows that there is an end of this contention, and it is unnecessary for me to consider whether the agreement constitutes a valid obligation or not. With respect to any act of misfeasance on the part of 3rd defendant, it must be adjudicated upon in a separate action, as the grounds of complaint and injury sustained are totally different, and for this reason the decree of the Lower Court passed against him is reversed, the plaintiffs paying all costs of suit, without pre-

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judice to their right to sue him again on a plaint properly prepared, setting forth the true grounds of action."

The 2nd plaintiff specially appealed on the grounds :—

I. There was a complete cause of action against 3rd defendant as set out in the pleadings.

II. There was no misjoinder.

III. The decree of the original Court completely decided all points in issue between the parties.

IV. The 3rd defendant was in no way prejudiced, for all his evidence was heard and he had no more to offer.

Johnstone for the special appellant, the 2nd plaintiff, contended that the suit was not multifarious: there was a complete cause of action for account against all three defendants. He cited *Parr* v. *The Attorney General,* 8 Cl. & F. 409, and *Manners* v. *Rowley,* 10 Sim. 470, which latter case, he submitted, was on all fours with the present. He further contended that there was nothing in the Civil Procedure Code preventing such a suit being brought.

Handley for the special respondent, the 3rd defendant, contended that the English cases cited did not apply. This case is governed by the Civil Procedure Code, the 8th Section of which is the only one enabling different causes of action to be joined. It, however, applies only to causes of action *by and against the same parties,* which implies that causes of action against different parties cannot be joined.

Johnstone replied.

The Court delivered the following

JUDGMENT :—The Civil Judge has dismissed this suit as against the 3rd defendant on the ground of multifariousness, the 3rd defendant having been sued on the ground of misappropriation, while the cause of action against the 1st defendant was breach of contract.

We find, however, that the plaintiffs in substance sued for an account of a certain fund, of which a part had admittedly been paid into the hands of the 3rd defendant, and, as he was evidently interested in the question how much had been paid to him by the other defendants, we think that he was properly included in the suit as a defendant, and we fail to see

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that he was prejudiced by the course of the proceedings, in which he appears to have had ample opportunity of proving his case.

We must, therefore, reverse the decree passed by the Civil Judge, and remand the appeal for decision on the merits.

The Civil Judge in his final decree will make provision for the payment of the costs hitherto incurred.

Appeal allowed.

Original Jurisdiction. (a)

Original Suit No. 262 *of* 1872.

MULLA JAFFARJI' TYEB ALI SAIB

against

YACALI KA'DAR BI' and others.

A Commissariat Officer named Mackellar had a butler named Lálah Miyah, who was employed to put forward with the money of Mackellar, or his own, various large contracts. Two accounts were opened in several houses of agency in the names of Mackellar and Lálah Miyah. To secure himself, Mackellar caused Lálah Miyah to execute a will leaving his whole estate to Mackellar. Testator and legatee perished together in the *Persia* steamship, in 1864. The Administrator General of Madras administered to Lálah Miyah's estate, but the personal representatives of Mackellar contested the right of the Administrator General to pay over the fund to those of Lálah Miyah. The result was that Lálah Miyah's representatives, the present defendants, were driven to a suit to establish their rights. Not having funds to prosecute that suit, Lálah Miyah's representatives were recommended by their attorney, C, to apply to one Jaffarjí Tyeb Ali (the present plaintiff) who was also a client of C's, for the necessary funds. Jaffarjí consented to advance money for the purposes of the suit and on the 28th July 1869 a so-called Deed of mortgage, drawn up by C, was executed between the present defendants as mortgagors and the plaintiff, Jaffarjí, as mortgagee, whereby in consideration of an advance of the sum of Rupees 5,000 (the receipt of 1800 Rupees of which was by the instrument acknowledged) to be made by Jaffarjí to such attorney as he should select, before the 31st of December 1869, the defendants mortgaged every thing to which they might be entitled or recover by suit, the mortgage to be defeasible on payment of 50 per cent. of what they might recover by suit, and a further 50 per cent. upon all to which they might be entitled as the persons entitled to Lálah Miyah's estate. They also covenanted to repay the money lent with interest. The present defendants succeeded in their suit against the representatives of Lálah Miyah, and this suit was brought by Jaffarjí to recover a commission of 50 per cent on the sum recovered, and the sums advanced, with interest. Defendants denied that plaintiff had fulfilled his part of the agreement and alleged that in consequence of his neglecting to supply funds they had been compelled to borrow of a third party. They also pleaded that the agreement was void for champerty and maintenance. *Held* that by the Law of England, which prevailed in the present suit, this contract was clearly void, being contrary to the plain provision of the Common and Statute Law against maintenance, and that

(a) Present :—Holloway, J.

it was also void as being contrary to public policy. The Court further found that the plaintiff had failed to fulfil his part of the contract, but allowed him to recover the sum really advanced by him, viz., Rupees 2,200, with interest.

IN this suit the relief sought by the plaintiff was :—Payment of Rupees 6,295-1-0 principal and interest due for moneys lent by plaintiff for the use of the defendants : further interest at 12 per cent. per annum, from the 16th April 1872 until payment, on the sum of Rupees 2,100, part of the said sum of Rupees 6,295-1-0: payment of the sum of Rupees 18,722-7-2 due by defendants to plaintiff for commission at 50 per cent. on the sum of Rupees 37,444-14-5 (less costs decreed to the defendants in Original Suit No. 508 of 1867, hereinafter mentioned) being the amount due by the terms of a certain indenture of mortgage made by defendants in favor of plaintiff and dated 28th July 1869 : that an account be taken, if necessary, of the sums realized or to be realized under the decree in the said O. S. No. 508 of 1867 : that an injunction do issue restraining defendants or their attorneys from receiving from the Administrator General of Madras and as such the administrator of the estate of Lálah Miyah deceased, the defendant in the said Original Suit No. 508 of 1867, or any other person liable to pay the same, any sum or sums of money payable under the decree in the said Original Suit No. 508 of 1867 : that a receiver be appointed to collect such monies : that the plaintiff be declared to have a charge upon such monies and that his claims be directed to be paid before any of the claims of the defendants : costs and further relief.

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The subject of the plaintiff's claim was as follows :—

The defendants were the only legal heirs and representatives of one Lálah Miyah deceased, who was a contractor and who was lost on board the steamship *Persia,* which foundered at sea during the cyclone of October 1864. Lálah Miyah by his will, dated 20th October 1862, appointed one Major Mackellar his executor and universal legatee, who was also lost in the the *Persia* during the said cyclone. The Administrator General of Madras obtained administration with will annexed to the estate of Lálah Miyah on or about the 17th May 1867, and as such administrator received sums of money

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due to the estate of Lálah Miyah amounting to Rupees 34,800 in Government Securities and Rupees 2,644-14-5 in cash, or thereabouts. Major Mackellar by his will appointed the members of the firm of Binny & Co. of Madras, merchants and agents, his executors. Messrs. Binny & Co., as such executors, claimed the aforesaid monies as executors of Lálah Miyah on two grounds.—Firstly that Major Mackellar was universal legatee under the will of Lálah Miyah, and secondly that Lálah Miyah was the butler of Major Mackellar and that all monies made by Lálah Miyah were in fact the monies of Major Mackellar, who, not being able to trade in his own name, as being in Government employ, traded in the name of Lálah Miyah. Defendants, the personal representatives of Lálah Miyah, having no money and being therefore unable to bring a suit to establish their right to his estate, applied to the plaintiff to advance them moneys and to aid and assist them in the prosecution of such suit. The plaintiff agreed to do so and on the 28th July 1869 a registered agreement or Indenture of Mortgage (*hereafter set out*) was made between plaintiff and defendants.

Thereupon the defendants instituted Original Suit No. 508 of 1867 against the Administrator General and the Executors of Major Mackellar, and, on the 16th February 1872, obtained a decree against the said Administrator General for the payment to them, as the representatives of Lálah Miyah, of the money in his hands to the credit of the estate, after deducting his costs thereout. By such decree the Executors of Major Mackellar were ordered to pay the costs of the suit. The plaintiff advanced the sums of money mentioned in the particulars at foot on account of the said suit and aided the defendants in the conduct of it, and plaintiff insisted that there was due to him, over and above the sums so lent with interest, a commission of 50 per cent on the sum decreed to defendants, as provided in the registered agreement (B). The cause of action was the breach by the defendants of the terms of the Indenture before mentioned and accrued on the 16th March 1872.

The particulars were as follows :—

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		Rs.	As.	P.
1869 July 28.	To amount advanced by the plaintiff and admitted by the defendants to have been received by them from the plaintiff as per terms of the herein-before mentioned Indenture..................................	1,800	0	0
Oct. 15.	To amount advanced in Original Suit No. 508 of 1867................	500	0	0
1870 Dec. 4.	To do do do ...	2,800	0	0
		5,100	0	0
	To interest at 12 per cent on Rupees 1,800 from 28th July 1869 to 15th April 1872..............................	586	12	9
	To interest at 12 per cent on Rupees 500 from 15th October 1869 to 15th April 1872.........................	150	0	0
	To interest at 12 per cent for Rupees 2,800 from 4th December 1870 to 15th April 1872........................	458	4	3
		6,295	1	0
	Amount of plaintiff's commission as above....................................	18,722	7	2
	Total amount due...	25,017	8	2

Defendants in their written statement said that 1st and 4th defendants were Gosha women and transacted all business through the 3rd defendant, husband of the 4th defendant and son-in-law of the 1st. That in the year 1867 defendants wished to sue to establish their right to the estate of Lálah Miyah, but not having funds they applied to one Devarájulu, who agreed to lend them money for the conduct of the suit. Accordingly in November 1867 they filed the plaint in Original Suit No. 508 of 1867 and Devarájulu paid Rupees

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260 to third defendant, who paid same to Mr. Carr, an attorney of the High Court, as the attorney for the plaintiff in the said suit. Devarâjulu died in 1868 and the 3rd defendant, on the recommendation of Mr. Carr, applied to plaintiff to advance the necessary funds. Plaintiff agreed to do so and in July 1868 informed 3rd defendant that he had paid Mr. Carr Rupees 1,000 on account of the said suit, and asked him and the other defendants to execute a deed securing repayment of all advances made. Some time in July 1869 a deed was brought to the 1st, 2nd and 4th defendants, who were in a bandy in the street, and they were requested to sign same. The contents were not clearly explained to them. They were also required to sign a receipt at the bottom of the deed for Rupees 1,800, which they declined to do as they had not received same, or any part thereof, and although plaintiff informed them that he had paid Mr. Carr Rupees 1,000 for the conduct of the said Suit No. 508 of 1867, yet he had not in any way proved the payment thereof. As plaintiff did not pay defendants any part of the said sum of Rupees 1,800, 3rd defendant, in August 1869, instructed Mr. Carr to demand payment thereof. Mr. Carr thereupon wrote to plaintiff demanding payment of Rupees 621 as the balance of the Rupees 1,800, giving credit for Rupees 1,000 and also, by mistake, for Rupees 179 paid by plaintiff to defendants and for which they had given him a promissory note. Defendants admitted the payment to Mr. Carr, on 15th October, of Rupees 500, part of the said sum of Rupees 621, but alleged that it had never reached their hands and that plaintiff had never paid the balance thereof to Mr. Carr or themselves. They denied that the covenant in the deed of 28th July 1869 had been performed, by which plaintiff covenanted with the defendants that he would, whenever required by them, pay in the conduct of the said suit to such attorney as should be employed such sum or sums of money as, together with the said sum of Rupees 1,800, should not exceed in the whole the sum of Rupees 5,000, on or before the 31st December 1869, or that the sums mentioned in the plaintiff's particulars of demand were advanced to them or on their behalf, or that the plaintiff aided them in the conduct of the said suit. Defendants further said that they and the said Mr. Carr frequently

applied to the plaintiff during 1870 and 1871 for further advances on account of the said Original Suit No. 508 of 1867, and on the 14th February 1871 the defendants, being informed by the said Mr. Carr that the necessary funds were not being supplied, gave him notice not to receive any further moneys from the defendant, as one Subbraya Chetti would advance all sums necessary for the continuation of the suit. Since that date the said Subbraya Chetti made all the necessary advances to the extent of Rupees 3,500, on the repeated requests of Mr. Carr. Defendants further said that the costs in Original Suit No. 508 of 1867 had been taxed, and the amount certified as between party and party amounted to Rupees 3,394-10-0, and as between attorney and client to Rupees 4,300, or thereabouts. That on 14th May 1872 the defendants in Original Suit No. 508 of 1867 remitted through their attornies to Mr. Carr as attorney for the plaintiff the said amount of the taxed costs as between party and party. That plaintiff did not at any time furnish defendants with an account of the monies alleged to have been paid by him on their account, or produce any vouchers in support of such alleged payments, nor did he make any demand upon them in respect of the sums claimed in the suit.

The defendants further submitted that no provision was made in the deed of July 1869 for interest further than up to the 31st December 1869. That the action was premature inasmuch as the decree in Original Suit No. 508 of 1867 had not been issued. That plaintiff could not recover on the deed of July 1869 as the consideration had failed. That as the whole costs incurred by the defendants as plaintiff in Original Suit No. 508 of 1867, and as taxed between attorney and client, only amounted to Rs. 4,300, and as they had to obtain advances from the said Subbraya Chetti, over and above what (if any) had been paid by the plaintiff herein, to the extent of Rs. 3,500, the plaintiff did not exercise due care and attention in the payment of the said advances to the said Mr. Carr as it was incumbent on him to do, and that the loss and damage which defendants sustained by reason of such want of due care should be set off against the amount, if any, found to be due to plaintiff. That the said deed of July 1869 was obtained

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from defendants by fraud and misrepresentation, and that the contents thereof were not fully explained to them. That the said deed was void on the ground of champerty, being against the principles of good policy and justice and tending to promote litigation in which the plaintiff had no personal interest. That it was unnecessary for plaintiff to bring this suit, as the deed of July 1869 gave him ample powers of repaying himself and that the suit should be dismissed.

The following issues were settled.

1. Whether by plaintiff's non-performance of his stipulations according to the agreement, the defendants are discharged from their obligation under it?

2. Whether it is voidable and ought to be avoided on ground of misrepresentation?

3. Whether it is void on ground of champerty?

4. Whether this suit is brought before the proper time?

5. Whether even if the agreement is void the plaintiff is entitled to recover the monies advanced, and how much?

The Document B, before alluded to, was to the following effect:—

This Indenture is made the 28th day of July 1869, Between Kádar Bee a Muhammadan widow, Muhammad Yakúb a Muhammadan inhabitant without employ, Muhammad Yakúb a Muhammadan merchant and Zynab Bee his wife now respectively residing at No. 20 in Dasudín Khan's Bahadur street at Triplicane within the local limits of Madras (hereinafter called "the Mortgagors") of the one part, and Mulla Jaffarjí Tyeb Ali Saib of Madras, merchant, and residing at Moor street in the Black Town of Madras (hereinafter called "the Mortgagee") of the other part: Whereas the mortgagors have some time since instituted a suit in Her Majesty's High Court of Judicature at Madras (Original Suit No. 508 of 1867) against the Administrator General of Madras and as such the Administrator of the estate and effects of Lálah Miyah late a contractor, but now deceased, and Clement Simpson the Executor with Probate of the last will of John

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Patrick Neil Donald Mackellar, late a Major in the Madras Staff Corps and Assistant Commissary General on the Madras establishment, but now deceased, for the recovery of the shares of the mortgagors in the property, estate and effects of the said Lálah Miyah deceased, as in the plaint in the said suit mentioned: AND whereas the mortgagors have applied to the mortgagee to aid and assist them in the conduct of the said suit and to advance to them such sums of money as they the mortgagors may require for the purpose of enabling them to carry on the said suit, and to defray the necessary expenses thereof: AND WHEREAS at the said request of the mortgagors the mortgagee has some time immediately before the execution of these presents advanced and lent to the mortgagors the sum of Rupees 1,800, and has agreed to advance to the mortgagors such further advances and sums of money as together with and including the said advance of Rupees 1,800 shall not exceed the sum of Rupees 5,000, upon having the repayment thereof with interest as hereinafter mentioned secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of Rupees 1,800 sometime immediately preceding the execution of these presents paid by the mortgagee to the mortgagors (the receipt whereof the mortgagors do and each of them doth hereby acknowledge) and also in consideration of the covenant on the part of the mortgagee hereinafter contained, they the mortgagors do and each of them doth hereby for himself and herself, his and her heirs, executors, administrators and representatives, covenant with the mortgagee, his executors, administrators and representatives, that they, or some or one of them, their, or some or one of their heirs, (*&c.*) will pay unto the mortgagee, (*&c.*) the sum of Rupees 1,800, on the 31st day of December 1869, with interest thereon in the meantime at the rate of 12 Rupees per cent. per annum without any deduction, and will also on the said 31st day of December 1869 pay to him, or them, such other monies as shall be advanced by him or them to or on account of the mortgagors, or as shall or may become due to the mortgagee, (*&c.*) by the mortgagors, together with interest thereon respectively at the rate aforesaid from the time or times of the

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same being advanced or becoming due without any deduction, and shall and will also pay to the mortgagee, (*&c.*) within one Calendar month after the decree of the said High Court at Madras, or within one week after a compromise or settlement of the said suit, a commission at the rate of Rupees 50 per cent, on the sum or sums of money, being the amount of the value of the property and money which shall or may be decreed to the mortgagors, or any or either of them, by the said High Court at Madras, or awarded to them or any or either of them on such compromise or settlement, and a like commission of Rupees 50 per cent. on the sum or sums of money, being the amount or value of the property and money which shall or may be paid or payable to the mortgagors, or any or either of them, as the parties or party rightly entitled to the property, estate and effects of the said Lálah Miyah deceased, of what nature or kind soever, and wheresoever the same may be, after deducting from the amount of the value of the said money and property the amount of costs incurred in the said suit: AND THIS INDENTURE ALSO WITNESSETH, that in consideration of the premises they the mortgagors do, and each of them doth hereby convey, release and confirm unto the mortgagee, his heirs and assigns, all such part and parts of the said property as by the decree to be made in the said suit, or upon a compromise or settlement, may be declared or awarded to be the property of the mortgagors or any or either of them, and all such part and parts of the property and effects of the said Lálah Miyah deceased, wherever same may be, which shall be payable to the mortgagors as the parties or party rightly entitled thereto, and shall be of freehold tenure, together with all rights, privileges, easements and appurtenances whatsoever, to the said hereditaments or any part thereof held, used, or enjoyed, or reputed as part thereof, or appurtenant thereto, and all the estate and interest of the mortgagors, or any or either of them, in the said premises, to hold the said premises unto and to the use of the mortgagee, his heir and assigns: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement and in consideration of the premises they the mortgagors do, and each of them doth hereby assign and make over unto the mortgagee, (*&c.*) all such part and parts of the said property

as by the decree to be made in the said suit, or upon a compromise or settlement thereof, may be declared or awarded to be the property of the mortgagees, or any or either of them, and all such part and parts of the property, estate and effects of the said Lálah Miyah deceased, wheresoever the same may be, which shall be payable to the mortgagors as the parties or party rightly entitled thereto, and shall consist of money, jewels, securities for money debts, judgments and other personal property, and all the estate, right, title, interest and demand whatsoever, both at Law and in Equity, of them the mortgagors, or any or either of them, in and to the said property, and all benefit and advantage whatsoever to be derived therefrom, and which shall or may at any time hereafter be obtained by reason of any decree which may be made in favour of the mortgagors or any or either of them, in the said suit, or upon any compromise or settlement thereof, or otherwise as aforesaid: To HAVE, HOLD, receive and take the same unto the mortgagee (*&c.*): PROVIDED ALWAYS that if the mortgagors, or some or one of them, their, or some or one of their heirs, (*&c.*) shall pay to the mortgagee, (*&c.*) the said sum of Rupees 1,800, and interest at the rate aforesaid, on the said 31st day of December 1869, without any deduction, and shall also, on the said 31st day of December 1869, pay to him, or them, such other monies as shall be advanced by him, or them, to or on account of the mortgagors, or shall or may become due to him or them by the mortgagors, or any or either of them, their, or any or either of their executors, administrators, or representatives, with interest thereon respectively at the rate aforesaid, together with the said commission of Rupees 50 per cent. on the value and amount of all monies and property which shall or may be recovered or received by the mortgagors, or any or either of them, their, or any or either of their executors, administrators, or representatives, under the decree or under a compromise in the said suit, and also a like commission of Rupees 50 per cent. on the value or amount of the property and money which shall or may be payable to the mortgagors, or any or either of them, as the parties or party entitled to the property, estate and effects of the said Lálah Miyah deceased, of what nature or kind soever and wheresoever the same may

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be, without any deduction, then the mortgagee his heirs, (*&c.*) will at any time thereafter, upon the request and at the cost of the mortgagors, or the survivors or survivor of them, or the heirs, (*&c.*) of such survivor, their or his assigns, reconvey and assign the said premises respectively to the mortgagors, their executors, (*&c.*) or as they he or she shall direct: AND it is hereby declared that the mortgagee or his heirs, (*&c.*) may at any time or times after the said 31st day of December 1869, or after any default on the part of the mortgagors, or any or either of them, their, or any or either of their executors, administrators, or representatives, in observing all or any of the covenants and provisions on their, or his or her part, hereinbefore contained, without any further consent on the part of the mortgagors, their heirs, (*&c.*) sell the said premises, either together or in parcels, and either by public auction or private contract, and may buy in, or rescind, any contract for sale, and re-sell without being responsible for any loss which may be occasioned thereby, and may execute and do all such assurances and things for effectuating any such sale as he or they shall think fit, and that upon a sale of all, or any of the said premises, hereinbefore expressed to be hereby granted by any person or persons who may not be seized of the legal estate, the person in whom the legal estate shall be vested shall execute and do all such assurances and things for carrying the sale into effect as the person or persons by whom the sale shall be made shall direct: PROVIDED ALSO that upon any sale, purporting to be made in pursuance of the aforesaid power, no purchaser shall be bound to enquire whether any money remains upon the security of these presents, nor as to the propriety or regularity of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale the same shall, as regards a purchaser, be deemed to be within the aforesaid power, and be valid accordingly: AND it is hereby declared that the said sum of Rupees 1,800 and all further sums amounting, together therewith, to the sum of 5,000 Rupees, to be advanced by the mortgagee pursuant to the covenant and agreement herein after contained, belong to the mortgagee, and that the receipt of the mortgagee or his executors, administrators, representatives, or assigns, for all monies payable to him or them under these presents, and for the purchase monies of

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the premises sold pursuant to these presents, shall effectually discharge the person, or persons, purchaser, or purchasers, respectively paying the same therefrom respectively, and from being concerned to see to the application thereof respectively, and that the mortgagee, his executors, (*&c.*) shall, out of the monies arising from any sale in pursuance of the aforesaid power, in the first place pay the expenses incurred on such sale, or otherwise, in relation to the premises, and in the next place apply such monies in or towards satisfaction of the money for the time being owing on the security of these presents, and then pay the surplus (if any) of the monies to arise from such sale to the mortgagors, their executors, administrators and assigns, as personal estate, whether the same shall have arisen from the sale of the said real or personal estate, and that the aforesaid power of sale and other powers may be exercised by any person, or persons, for the time being entitled to receive and give a discharge for the monies then owing upon the security of these presents: AND for the further and better enabling the mortgagee, his executors, administrators, or assigns, to obtain payment of the monies hereby secured, the mortgagors and each of them hereby irrevocably appoint the mortgagee, his executors, (*&c.*) their, and each of their attorney, for them and each of them, and in their, or his, or her names, or name, and on their, or his, or her behalf, at all times hereafter, and, notwithstanding that the said time hereby limited for payment of the monies hereby secured shall not have expired, to ask, demand, sue for and recover, and give receipts, releases and discharges for all or any part of the said premises, and the mortgagors do, and each of them doth hereby for himself and herself, his and her heirs, (*&c.*) further covenant with the mortgagee, his heirs, (*&c.*) that they the mortgagors, and all other persons lawfully or equitably claiming any estate or interest in the premises, will, at all times, at the request of the mortgagee, his heirs, (*&c.*) but at the cost of the mortgagors, their heirs, (*&c.*) do and execute all such acts and assurances for further or better assuring the said premises unto the mortgagee, his heirs, (*&c.*) in manner aforesaid and for enabling him and them to recover and receive all property, whether

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real or personal, which may be decreed or awarded to belong to, or become payable to the mortgagors, or any or either of them, their, or any or either of their heirs, (*&c.*) either under or by virtue of any decree to be made in the said suit, or upon any compromise or settlement thereof, or otherwise as aforesaid, as by him or them shall be reasonably required: AND the mortgagee doth hereby for himself, his heirs, (*&c.*) covenant with the mortgagors, their heirs, (*&c.*) that he the mortgagee will, whenever required so to do by the mortgagors, or any or either of them, advance and pay in the conduct of the said suit to such attorney as shall be employed (only with the consent of the mortgagee, his executors, administrators, representatives or assigns) in conducting the said suit, such sum or sums of money as shall, together with the said sum of 1,800 Rupees, not exceed in the whole the sum of 5,000 Rupees: AND it is hereby lastly covenanted and agreed, by and between the parties hereto, that the Indenture of mortgage made or expressed to be made, between the said parties hereto, on the 24th day of July 1868, and the covenants and agreements as are expressed, contained and declared therein, are by these presents determined, annulled, and made void. IN WITNESS whereof, (*&c.*)

Signed, sealed and deli ered by the above named Kadar Bí, Muhammad Yakub, Muhammad Yakub, Tynab Bí and Mulla Jaffarjí Tyeb Ali Saib in our presence (the contents hereof having been previously explained to them) by Shah Ali Saib, an Interpreter of the High Court at Madras.

The mark of Kádar Bí. (Seal.)

(Signed) Muhammad Yakub. (Seal.)

(Signed) Muhammad Yakub. (Seal.)

The mark of Tynab Bí. (Seal.)

(Signed) Jaffarjí Tyeb Ali Saib. (Seal.)

(Signed) JAS. CARR,
Attorney, Madras.

Explained by me on the 28th day of July 1869.

(Signed) SYED SHAH ALI SAIB,
Interpreter.

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Received the day and year first above written of and from the abovenamed Mulla Jaffarjì Ali Saib the sum of Rupees 1,800 being the consideration money abovementioned to be paid by him to us......Rs. 1,800

Witnesses.

(Signed) JAS. CARR.

(„) A. DILLON.

Stamp Rupees 125.

[Certificate of Registration endorsed.]

Miller and *Johnstone* for the plaintiff.

Mayne and *Gould* for the defendants.

The following judgment was delivered by

HOLLOWAY, J.—A Commissariat Officer, named Mackellar, had a butler named Lálah Miyah. In various parts of the world, principally in Burmah, the butler was employed to put forward with the money of Mackellar, or the butler, large contracts for the supply of bullocks, timber, &c. As the Commissariat Officer was the person to sanction such contracts, it is not surprising, as the case was, that the transactions were highly lucrative. Two accounts were opened in several houses of agency in the names of Mackellar and Lálah Miyah. To secure himself, Mackellar caused Lálah Miyah to execute a will leaving his whole estate to Mackellar. Testator and legatee perished together in the *Persia*. The Administrator General of Madras administered to Lálah Miyah's estate, but the personal representatives of Mackellar contested the right of the Administrator General to pay over the fund to those of Lálah Miyah, and did not hesitate to drag before the Court the systematic misconduct of their relative and his frauds upon his employers, and sought to recover Lálah Miyah's estate as if his. The result was that Lálah Miyah's representatives, the present defendants, were driven to a suit against the Administrator General, which was substantially conducted by the representatives of Mackellar as defendants. On this state of facts it is no matter of surprise that the suit terminated in favor of the plaintiff. On these facts such a result could surprise no one, and it was still less a surprise upon Mr. Carr, the attorney, for

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he had obtained the advice of competent counsel and thought it, as he naively says, a likely case, although to the representatives of Lálah Miyah he gave it a colour of doubt and difficulty. His connexion with the suit commenced by an introduction by one Devarájulu, whether a speculator or broker does not clearly appear, but perhaps the former. This led to a requirement of funds, and the present plaintiff is suggested by Mr. Carr as one likely to advance them. It is instructive to know that this Jaffarjí, the plaintiff, was a client of Mr. Carr and a party to several suits, some of which were then in progress and some are proceeding now. The first fruits of the union were the document A, securing an advance of Rupees 2,000—and it is necessary to remark, once for all, for the fact becomes afterwards important, that this was the sum for which Mr. Carr originally agreed to conduct the suit, and that this sum, as his accounts show, would more than have covered every expense down to the very eve of the trial. This, however, did not suffice, and on the 28th day of July 1869, when, as the bill of costs, loose as it is as to dates, sufficiently shows, the document B is executed—no human being can doubt, through the influence of Mr. Carr—providing for the advance of a sum of money up to Rupees 5,000 for the expenses of the pending suit at the request of the defendants and to such attorney as the plaintiff shall select; a delicate acknowledgment of the services already rendered by Mr. Carr, and not unimportant when we come to consider the relations between the parties and the character of the transaction which it is sought to enforce.

In return for this stipulation the present defendants, in a jargon so unholy that they could not possibly understand it, for clearly its author did not, covenant on their part in B. It professes to be a mortgage of everything to which they may be entitled, or recover by suit, defeasible on payment of 50 per cent. of what they may recover by suit, and a further 50 per cent. upon all to which they may be entitled as the persons entitled to Lálah Miyah's estate. As it does not say other than the sum recovered, the obvious meaning is that they are to pay one-half for their victory and the other for their title,

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and this with the money advanced with interest recoverable however on the 31st December 1869 and powers of sale exerciseable before the money became due and the monies advanced also secured by the mortgage, the result would be that the fruits of the victory would be the liability for a large sum of money. This is the only construction of this document. It is an agreement to maintain a suit, already commenced, by lending funds for its conduct, and a bargain to have the whole of the thing in dispute and something more. Only half of it is asked in the present suit and the stipulation for the whole will be a merely philological, not a legal, objection to calling the transaction champerty. That this is illegal both by the Common and Statute Law of England there is no doubt (Tindal, C. J. 7 Bing. 378: Eldon, C. 18 Ves. 129). This last case is important as affirming the Criminal Law of England upon this matter as stated in Hawkins. These great masters of the Law of England were, therefore, unaware that the doctrine of champerty and maintenance had disappeared from the law both Civil and Criminal. Further the Statute (1 Hawk. P. C. 462, 8th Ed.) and the Common Law which it affirmed is the law of this Court. The last edition of Russel shows very clearly that it is still an indictable offence, and there is not a single case to justify the notion that the Judges have illegally repealed these Acts of Parliament.

Findon v. *Parker (a)* (the poor man of Lord Abinger) was decided on the ground that those who agreed to conduct the suit had a common interest and was clearly within the exception of Section 14 of Hawkins. The dictum of the Chief Baron was not the ground of the decision.

Sprye v. *Porter (b)* went on the express ground that the declaration was not bad upon its face, because it did not appear that any suit was depending, or that any suit was to be instituted. It seems not to have been noticed that the 7th, 8th and 9th pleas were, on demurrer, held good. They stated a case of maintenance by a promise to supply information and evidence. Again, no authority for the abolition of the doctrine, but quoting *Stanley* v. *Jones*, 7 Bing., as authority for its existence.

(a) 11 M. & W. 682.
(b) 7 E. & B. 58.

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In *Fischer* v. *Kámala Naik* the Court went solely upon the ground that there was no quality of maintenance or champerty in it. The case is, as Phear, J. says, an authority for applying the rule if such an agreement is contrary to public policy on this ground and not the contrary (see 4 Ben. L. R. 48).

Anderson v. *Radcliffe*, E. B. & E. 806, is not a case of champerty, but distinctly recognises its existence.

Cockell v. *Taylor*, 15 Beav. 106-115, was a sale of an interest in a fund in Court. *Knight* v. *Bowyer*, 23 Beav., 609-628; 2 DeG. & J. 421-444; decides that a purchase by an attorney may be impeachable by the client, but does not in itself render the transaction null and therefore a defence to third persons on the ground of the absolute invalidity of the title conveyed by it.

The case of *Earle* v. *Hopwood*, 9 C.B.N.S. 566, expressly decides that a contract is illegal upon the ground of this abolished doctrine of maintenance, and the judgment shews that it would have been even more clearly illegal if there had been a stipulation for the division of the fund. The relation was that of attorney and client, but the judgment goes expressly upon the general doctrine.

There is, therefore, nothing whatever to justify the notion that where the law of England prevails, and in this Court it does where there is nothing in the Law of Contracts of Hindus and Muhammadans to affect it, such a contract as this is not void. It is a contract distinctly forbidden and indictable by Common Law and by Statute, and nothing is clearer than the invalidity of any contract which even tends to violate an Act of Parliament. *Fisher* v. *Bridges*, 3 E. & B. 642, was a strong application of this undoubted rule. The criticisms upon the case do not touch its applicability here, for this contract is a direct violation of the Statute and of the Common Law.

In 4 Ben. L. R. O. C. 1, the learned Judges, in a case differing from the present by the circumstance that it was

complicated by the question whether the agreement of the widow could bind the reversioner, were somewhat hampered by the question whether the law of the Original Jurisdiction or that of the Mofussil ought to prevail, and set aside the sale on the ground that it was a gambling speculation. Mr. Justice Phear, however, expressed a strong opinion, from his own observation, that such trafficking in litigation was contrary to public policy and ought to be held void everywhere. Although not strictly necessary in the present case—in which the law of England governs, and in which not only is there a stipulation to lend money for carrying on the depending suit on condition of a share (or rather the whole) of the proceeds, but to make the plaintiff master of the litigation by compelling it to be carried on by an attorney determined by him—I must express my entire concurrence with the opinion of Phear, J.

The next question is whether this contract is vicious, and impeachable upon other grounds than the plain provision of the Common and Statute Law against maintenance. Now, although in the case (*Grose* v. *Amirtamayi Dási*, 4 Ben. L. R. O. C. 1) Mr. Justice Phear clearly expresses, and Mr. Justice Macpherson plainly indicates that, even in the Mofussil, contracts infected with maintenance and champerty are void upon the ground of public policy—a proposition covering more than this case requires,—the Chief Justice, without saying that he differs, says (p. 29) that if not void on the ground of champerty, it was so against the reversionary heirs, on the ground that it was an unconscionable bargain, and a speculative, if not a gambling contract. For this position he refers to the batch of cases in the Privy Council, now reported at 12 Moo. 275. The reference to gambling there was made to show that the gambler had not fairly laid down his stake, that the contract was for present payment of a certain sum which was never paid, and that specific performance ought not to be granted when the one side was only ready to pay now that the risk had ceased altogether. The iniquity of getting the whole stake on the other side when the risk has been diminished is the point (p. 308). I doubt, therefore, whether this

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case is a distinct authority for the judgment of the Chief Justice. If, however, it would be void as a gambling transaction, it can scarcely be improved by the circumstance that the plaintiff staked nothing at all, that he played the game with loaded dice.

I have been pressed to give my opinion whether, irrespectively of the Common Law, such contracts ought to be held void on the ground of their antagonism to public policy. I here call in aid the vigorous observations of Phear, J., and as the present case does not absolutely demand the decision, I shall be more brief than the importance of the question would otherwise require.

Hume, quoted 1 *R. C. and M.* 254, points out that associations for carrying on law suits were substituted for the old associations for robbery and violence (See Cap. XIII).

In this country it may be added that this is now the favorite instrument for revenging private quarrels. A suit against a man's enemy is commenced in the name of another, promoted by the money of the enemy and sustained by the perjury which he suborns. The state of Hindu society with joint families, dissatisfied junior members, adoptions real or fictitious, affords a fine field for the operations of these speculators in litigation. At the elbow of every man with a grievance, real or imaginary, is one of these unclean animals busily engaged in fanning into a law suit every trifling difference. Where a zamindári is concerned the operations are on a larger scale. The claimant is taken up either by an individual speculator or a joint-stock company. Having nothing, he is prepared to promise everything, and agreements stipulating for enormous sums of money are executed in favor of these people. The suit is promoted with their money, and the victory leaves the victor and the vanquished together prostrate at the feet of these unholy speculators. The nominal plaintiff is not the "poor man" of Lord Abinger, but the poor neighbour of Quirk, Gammon and Snap. Let a man with the smallest knowledge of this country cast his eyes upon the wide-spread ruin and immorality created by these proceedings, and he will scarcely doubt that it is contrary to

public policy, if the welfare of a country is any element therein, to permit these creatures to bargain for the proceeds of the litigation which they have commenced, fomented and carried on without the smallest interest, other than the nefarious bargain, in the suit which they are conducting. On that portion of public policy which consists in the purity of the administration of justice, the effect is still more directly pernicious. The unlimited supply of evidence to support any claim, true or fictitious, renders it easy for these speculators to produce for the support of any claim, with equal ease whether it is true or false, a body of people called skilled witnesses, whom by any mode of cross-examination directed merely to inconsistencies in the story which they come to tell, it is impossible to break down.

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It creates much surprise in some quarters, when those acquainted with the country give as a reason for attaching no weight to a body of this sort of evidence, when opposed to probabilities which to those ignorant of the country appear slight, that one of these speculators is the parent of the suit; and the result is that the Native judge, as well as the European, is often led by his knowledge of this mechanical system of weighing evidence to say that he can see, that is, assign, no ground for discrediting this body of evidence which is not inconsistent with itself, or not contradicted. The permission of these bargains tends directly to multiply this enormous evil. No man's rights are secure, and if, by accident, the right decision is arrived at, the fruits of the victory are not the victor's. It is a perfect case of "sic vos non vobis." Let any respectable Hindu be asked his opinion upon the point, and I will guarantee that he will regard this as a very feeble picture of the organized iniquity, misery and mischief, resulting from the permission of these bargains. Whatever, therefore, the state of things in England, there can exist no doubt that all the evils against which the Statute of Edward was directed exist in their full enormity in this country, aggravated by the character of the people to an extent which our own country cannot furnish and never could have furnished an example. Although, therefore, not necessary to the

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decision of this case, I should, if necessary, have held this to be a contract which ought not to be supported.

The next question is whether the plaintiff has failed to perform his part and thereby exonerated the defendants from the performance of their covenant, if otherwise sustainable.

If the solution of this question depended upon whether the whole Rupees 5,000 had been advanced, I should find this issue against the plaintiff. I do not believe, despite the document I and the evidence of Carr, that his liability on this note of Alldritt's was either released by Jaffarjí, or accepted by Carr, as an advance on account of this suit. Not only is the entry a most suspicious looking one, but its authenticity is rebutted by Carr's demand of Rupees 3,000 more (Exhibit VIII), when, if this evidence was true, he had already more money than was required to bring the suit to a conclusion. This inference, of course, would be stronger but for the evident combination to drive to extremities the defendant, who had declined to receive more money from Jaffarjí.

Even, however, taking into account the by no means trifling voracity of the attorney, it is, to me, incredible that if this release of liability had been accepted as a payment, even he would have ventured to demand Rupees 3,000 more, being in possession of something like Rupees 4,000 to cover a liability which amounted finally to £22. I am further confirmed in this view by the fact that when Jaffarjí was examined some days before the attorney, who pleaded illness as a ground for not attending, neither he nor his advisers suggested Alldritt's note, but fell back upon the Government Promissory Note which was lodged as security generally, and he, as I believe, falsely asserted a specific authority to appropriate Rupees 2,000 to this very suit. If this were true, the pantomime of the letter of demand of the balance of the Rupees 2,000 would be difficult of explanation.

It is further rebutted by the fact that this payment was never communicated to the less favored client, and this circumstance is of importance, because there can be no hesitation

in believing the evidence of defendant that he made frequent applications for money which were not complied with. That Mr. Carr was constantly pressing him there is no doubt. This, however, is not the question. By the bill of costs it is manifest that at the time at which the defendant declined to receive more money from Jaffarjí, irrespectively of the note, which I believe to have been no payment at all, the attorney had as much money as was required (not as he required) to carry on the suit. If, therefore, the determination of the case depended upon this point, it must be decided against the defendants.

It is clear that the transaction being in the form of a mortgage will not enable the plaintiff to evade the illegality. That mortgage can only be allowed to secure monies due upon a valid obligation. Although it is very doubtful whether the original loan is not tainted with the illegality of the purpose, I am not unwilling to allow it, following the Bengal case, to ènure as a security for the monies really advanced with the stipulated interest. That sum I find to be Rupees 2,200, for on looking at the unfortunate relation in which the defendants stood to the attorney, I do not see how I can treat the advance as not made by the plaintiff because a large share of it was appropriated by the attorney for the construction of the two documents.

I have not touched upon the question of right to relief in such a case as this on the ground of misrepresentation; that the making of the bargain was induced by a not true statement of the case; but in view of the fact that the defendants seem to have made with another man a bargain of precisely the same kind, there would be a difficulty on this and other grounds in saying that the misrepresentation was so the cause of the contract as to render it repealable.

There would be more doubt upon the question whether this agreement could stand in the relation of these parties. Ignorance on one side with, not "inopia consilii," but with consilium in the manifest interest of the other contracting party. I do not believe the defendant's evidence that the opportunity of consulting another attorney was refused to

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him. The case, in my view, stands thus :—An ignorant set of people having a claim of the simplest character, have their own natural apprehensions of the strange caprices of the law aggravated by a false colour of difficulty given to the case by their own attorney, who, equally exaggerating the expenses of so simple a suit, represents the necessity of a bargain with a more favored client. That bargain, of the most oppressive character, is made for a division of a fund which must certainly have been recovered, and in which the plaintiff really risked, and the attorney knew that he risked, nothing. It would be very difficult to say that such a contract could be allowed to stand for more than the *bonâ fide* advances. The decree will be that the fund in the hands of the Administrator General stand as security for Rupees 2,200 with interest at 12 per cent from the date of the first agreement. There will be no costs.

Messrs. Branson and Branson, Attorneys for the plaintiff.

Messrs. Prichard and Barclay, Attorneys for the defendants.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 363 of 1871.

RANI KATTAMA NA'TCHIA'R, ZAMINDARNI' OF SHIVAGANGA............ *Appellant.*

MUHAMMAD MI'RA RAVUTAN......... *Respondent.*

Certain idols and vessels of copper were discovered accidentally by one Shaik Mira and his brother, while digging for stones, in a masonry building underneath the ground in a rather elevated part of the bed of the tank of Anandùr which belongs to the Zamindári of Shivaganga. No intimation of the discovery was given by the finders to any public authority, but the Sub-Magistrate being informed of it by the Police, proceeded to the spot and recovered the idols on the 3rd or 4th day after they were found. They were then sent by the Magistracy to the Court of the Principal Sadr Amin of Madura to be dealt with under the provisions of Regulation XI of 1832. Proclamation inviting claimants was made and petitions asking for possession of the idols were presented by three parties.—1st by the Ráni of Shivaganga, on the ground that she was trustee of the Devastánams on her estate, on which the idols had been found. 2nd by the Stanikam of a temple in the village of Anandùr, and 3rd by the finder. The principal Sadr Amin adjudged the idols to be the property of the Rani and directed that they should be delivered to her. The finder appealed to the Civil Court, which reversed the

(a) Present :—Innes and Kernan, JJ.

decision of the Principal Sadr Amin and directed delivery to the appellant. Against this order the Rāni appealed to the High Court on the grounds—1st, that Reg. XI of 1832 only applies to cases in which the ownership of the property is undiscovered and that, in the present case, the Rāni was presumably the owner of the property found; 2nd, that a trespasser could not benefit by the finding. *Held* that the Rāni had no title to what had been hidden in former times in the soil now belonging to her: that it had been found that these idols were *hidden* in a stone chamber specially appropriated to that purpose and that she could not, therefore, claim a title as owner.

As to the objection that the finder, being a tresspasser, could not benefit—*Held* that it was unnecessary to consider this objection unless the Rāni had some right or title to the *treasure*, the same as she had in the soil of the tank. That she had not such right and therefore that the contention as to the right to the property found lay between the finder and the state, which had made no claim.

An objection, not before taken, was allowed to be argued at the hearing, viz. that the formalities prescribed by the Regulation had not been complied with. *Held* that though immediate notice had not been given by the finder, the property was within 3 or 4 days of its discovery in the hands of the authorities, who might be said, therefore, to have supplied the necessary notice.

THIS was an appeal against the order of J. D. Goldingham, the Civil Judge of Madura, dated the 13th September 1871, passed on Civil Miscellaneous Appeal Petition No. 342 of 1871, reversing the order of the Court of the Principal Sadr Amín of Madura dated 11th July 1871.

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Miscellaneous Petition No. 1129 of 1870 was presented to the Principal Sadr Amín's Court of Madura on behalf of the Ráni Kattama Nátchiár, Zamindární of Shivaganga, and trustee of the dévastánams situated on the said estate, praying that certain idols and vessels which had been found hidden beneath the ground within the limits of the village of Anandúr attached to her estate, might be delivered to her for the use of the dévastánams under her management.

Miscellaneous Petition No. 70 of 1871 was presented on behalf of one Nagunatha Gurukal, Stanikam of the temple of Thirumaninatha Sámi situated in the village of Anandúr, asking that the said idols &c, might be delivered to him, as they belonged to a ruined temple of the said village.

Miscellaneous Petition No. 341 of 1871 was presented, under Regulation XI of 1832, on behalf of one Muhammad Míra Ravutan, praying that the said idols &c., which were discovered by his brother (since deceased) in the back yard of his house while digging for stones, might be delivered to him.

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Upon reading these Petitions and also the report of a Commissioner deputed to ascertain the exact locality where the said idols were discovered, the Principal Sadr Amín made the following order:—

"On the 10th July 1870 one Shaik Míra (since deceased) and his brother Muhammad Míra and others were digging for stones when they discovered copper idols and vessels, specified in the schedule received with the Magistrate's letter of the 12th September 1870. Though intimation of the discovery was not given to any public authority by the finders immediately after the discovery, the Sub-Magistrate of Tiruvadani on receiving information of the discovery through the police, proceeded to the locality where the idols were found, and recovered them on the 3rd or 4th day after they were found. They have since been sent up to the Court by the Magistracy to be dealt with under the provisions of Regulation XI of 1832. The prescribed proclamation inviting claimants has been given; and the said Muhammad Míra, the surviving finder, and Ráni Kattama Nátchiar have preferred claims to the said idols. It is in evidence that the idols in question were discovered in a building underneath the ground in a rather elevated part of the bed of the tank of Anandúr, close to a garden belonging to the said Muhammad Míra, who tried to prove that the locality was included in his garden, but failed in the attempt, as all the witnesses examined in the matter concur in stating that the building in which the said idols were discovered was situated without the wall by which the said garden was enclosed. The report of the Commissioner who was deputed to make a local enquiry into the matter clearly shows that the idols were discovered, not in the garden of the said Muhammad Míra, but in the bed of the said tank. Muhammad Míra's witnesses, who are Muhammadans, claimed the said tank as the property of the Muhammadan community of Anandúr who owned the mosque which is contiguous to the tank; but the Commissioner's report places it beyond a doubt that the tank is the property of the Zamindár of Shívaganga, being one of the sources of irrigation on which the wet lands of Anandúr depend for a supply of water. The act of the said Muhammad

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Míra in excavating the bed of the tank for stones to build a mosque was itself not a lawful act, since the tank did not belong to him; and he had, therefore, no right to remove any stones or other valuable things from the bed of the said tank without previously obtaining the permission of the Zamindar, in whom the right of maintaining such works in a state of repair and of using them to her own and her tenant's advantage is vested. The discovery of the idols, followed by the commission of an act which is in itself illegal, would not give the said Muhammad Míra and his late brother any right to appropriate to themselves the idols so discovered. These appear to have been carefully secured under-ground in a masonry building covered with a roof of flat stones, and in all probability appertained to a temple which was dedicated to Vishnu, but which is now no more. The witnesses examined by the Ráni speak to there being at the present day a stone idol of Narasingaswámi, though now neglected, near the place where the copper idols were discovered; and the existence of this idol, coupled with the discovery of the copper idols, &c., in question, carefully secured in a subterranean building, satisfactorily proves that they belonged to an ancient temple now no more, and as such should be viewed to be the property of the Hindu population by whom they are worshipped: and the Ráni, as the head and representative of the Hindus residing in the zamindári, and as the recognised manager of all the Hindu religious institutions situated in the estate, entitled to have charge of these idols, to be by her deposited in one of the temples of the village for the use of the said community, on the double ground of the same having been found in the bed of a tank belonging to her, and of their having once appertained to a temple in the zamindári, of the pagodas situated in which she is the sole recognised manager.

For these reasons, I direct that the idols, &c., be made over to Ráni Kattama Nàtchiár, on the condition of her paying all the expenses incurred in sending them to Court and guarding them whilst in Court."

From this decision Muhammad Míra Ravutan, the Petitioner in No. 341 of 1871, appealed to the Civil Court.

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The Civil Judge delivered the following judgment, reversing the order of the Principal Sadr Amín.—

"Taking the facts as found by the Lower Court to be that the idols in question were discovered by Muhammad Míra Ravutan and his deceased brother, while digging for stones (whether with or without the Zamindární's permission is immaterial for the purposes of this case) in the bed of the tank of Anandúr in the Shivaganga zamindári, the point I have to determine is, of the parties before the Court, to whom should they be adjudged; that is to say, whether to the finders, or to the Zamindární claiming as general trustee of the dévastánams in her zamindári.

Upon a consideration of Regulation XI of 1832 I think two propositions are incontestible; 1st, that the provisions of this Regulation extend to the whole Presidency of Madras, whether to Ayen lands or to districts permanently settled; and 2nd, that the owner of the soil, *quâ* owner, has no inherent right of ownership in the thing or things discovered.

At the preliminary hearing of this Petition I was disposed to think (and indeed I so expressed myself) that the right to hidden treasures followed the rule in the case of minerals or other natural products of the earth, but further argument and consideration of the law which obtains in England satisfies me that this impression was unfounded. Section 2 of the Regulation under which these Proceedings were conducted seems to point out distinctly that the right to hidden treasure of the nature therein described, should, subject to certain limitations in value, vest in the finder thereof, if the actual owner be not discoverable, and the question therefore is whether the Zamindární's claim of right on behalf of the Hindu worshippers is clearly established.

Now upon this subject the evidence adduced goes no further than this,— that there is a strong presumption that the idols once belonged to an ancient temple dedicated to Vishnu and now non-existent, and it is upon this ground that the Principal Sadr Amín, considering them to be the property of the whole Hindu community, has adjudged them to the

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Zamindární as trustee of the dévastánams in the Shivaganga zámindari. With this conclusion I am unable to concur;—1st, because there is nothing in principal (and my authority is derived from analogy to what would obtain in Christian countries) to lead me to suppose that the idols of any given temple became, on its chance abandonment, the property of the whole Hindu community, for if they did, where, with any degree of certainty, could the limit be defined in the continent of India; and 2nd, because there is nothing in evidence to connect the Zamindární with the trusteeship of this particular temple; which, for all we know, might have existed long before the hereditary zamindári system was extended to this part of India, and whereas, as matter of fact, we all know that there are some temples in the Shivaganga zamindári with which the Zamindární has no concern. If, therefore, this be so, and if, as I have observed before, ownership in the soil carries with it no absolute right to the subject-matter of the claim, it follows that the claim preferred by the Zamindární wholly fails; and that being so, I do not see how the idols can be adjudged otherwise than to the finder. For these reasons I think the order appealed against must be reversed and the property ordered to be made over to Muhammad Míra Ravutan."

Against this order the Ránί appealed to the High Court upon the following grounds:—

I. Regulation XI of 1832 only applies to cases where no owner can be ascertained for the property found.

II. In this case the Ránί of Shivaganga was presumably the owner, inasmuch as the idols were found in the bed of a tank which is between and close to two pagodas and 1½ miles from a third, of all of which the Zamindární is trustee and manager.

III. The Regulation does not apply to cases where the finding is itself an act of trespass upon the lands of a third person.

At the first hearing of the appeal, on the 18th March 1872, the question was referred to the Civil Court whether the land on which the idols were found did in fact form part of the

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assets of the zamindári of Shivaganga. The Civil Judge answered in the affirmative and stated that the idols were found in a subterranean building on the bund of the tank of Anandúr, close by the finder's chilli garden, and that the village of Anandúr in fact formed part of the assets of the Shivaganga zamindári.

The appeal came on again for final hearing on the 14th August.

Mayne for the appellant.

Nevins Pillai for the respondent.

The Court delivered the following judgments—

INNES, J.:—This was a special appeal from an order of the Civil Judge of Madura, passed in appeal from the order of the Principal Sadr Amín, who had awarded certain idols to the Ráni of Shivaganga on a contention as to the right to them arising between her and the finder. The Stanikam of the temple of Thirumaninatha Swámi also put in a claim, but is not now before the Court.

The Civil Judge, on appeal, reversed this decision and decided in favor of the finder. It is now contended by the Ráni of Shivaganga, 1st, that Regulation XI of 1832 only applies to cases in which the ownership of the property is undiscovered, and that the Ráni of Shivaganga is in this case presumably the owner of the property found; 2nd, that a trespasser cannot benefit by the finding. A third ground was also admitted at the hearing, viz., that the formalities prescribed by the Regulation had not been complied with. With regard to this latter point it may be observed that the objection was not taken at the original enquiry nor in appeal, nor did it form one of the original grounds of special appeal. The Regulation requires immediate notice by the finder, but, from the facts found by the Principal Sadr Amín, it would appear that within 3 or 4 days of the property being discovered it was in the hands of the authorities, who may be said, therefore, to have supplied the necessary notice, which, if given on the third or fourth day after the discovery, would probably be early enough to satisfy he requirements of the Regulation. Now, as to the 1st ground

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the Civil Judge is right in his view that the Ráni has no title to what has been hidden in former times in the soil now belonging to her. It seems to be sufficiently found that the idols were *hidden* in a stone chamber appropriated specially to that purpose, and not accidentally buried in the position which they would ordinarily occupy in a Hindu temple. The Ráni could not, therefore, claim a title as owner. Then, as to the objection that the finder is a trespasser, it may be that the legislature did not intend that the right should arise to the finder if the discovery were made in the course of a wilful trespass upon the lands of another with an immediate view to such discovery. (See as to this the provisions of the Roman Civil Law, Code X. Tit. XV). But in this case the finding was accidental, and there appears to be nothing in the language of the Regulation to restrict the benefit it holds out to cases in which the property is found hidden in the soil of the finder. But supposing it were so, it is difficult to see how the special appellant, if held to have no title to the property found, could contest the right of the finder. She might, possibly, have an action for trespass, but the contention as to the right to the property found would be between the finder and the crown.

I would dismiss the special appeal.

KERNAN, J. :—The Principal Sadr Amín has found as a fact (and I am not aware that the finding has been questioned) that the copper idols "were discovered in a building underneath the ground in a rather elevated part of the bed of the tank," and that, "they appear to have been carefully secured under ground in a masonry building covered with a roof of flat stones." It is admitted before us that they are of the value of about 5,000 Rupees.

It has been scarcely questioned in argument that they come within the meaning of the words "or other valuable property" in Regulation XI of 1832. I am of opinion that they do fall within the meaning of those words and that they are Treasure within the meaning of that Regulation.

It was contended before us that they were not within the meaning of that Regulation "hidden treasure," and that they

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were not found buried in the earth, or otherwise concealed. To support this contention it was *alleged*, that a temple formerly stood over, or at, or near the spot where they were found, and that these idols had been used in that temple during worship there. There is, no doubt, evidence that a stone idol, now neglected, of Narasingaswámi, exists near the place (in the tank I assume) where the idols in question were found. It has been found as a fact that some temple did exist at one time at, or near the spot where these idols were found. It was then alleged that the chamber in which they were found was part of that temple, and was in fact the place of deposit, or underground strong room of the temple in which they were kept. This is mere matter of conjecture. No evidence has been given that it is usual in temples to have such underground chambers for keeping the idols, and, if such was the custom, ample evidence of the fact should be easily adduced. I cannot, therefore, agree that this chamber was the usual place of deposit of the idols.

If this temple has been abandoned, is it likely that these idols, valuable intrinsically and probably still more valuable as idols, should be allowed to remain undisturbed in what is said to be their place of usual deposit, when not in use for worship? I think it much more likely they should, after abandonment of the temple, be removed.

In my opinion, therefore, the facts found lead to the conclusion that these idols were buried beneath the ground and concealed, hidden, in fact, by whoever had the possession of them, to prevent them from falling into other hands. Whether such hiding was for safe custody during a time of disturbance, or for any other cause, is immaterial.

It is then contended for the Ráni of Shivaganga that, whether they were hidden treasure or not is immaterial, inasmuch as the Ráni is, in her capacity of Zamindár, trustee for the Hindu communities of all the temples on her estate, and, as such trustee, is quasi the owner of the idols in the temples. It is not pretended that the Ráni, or any of her ancestors, as trustees or otherwise, had possession at any time of the idols,

or that she, or they, were really the owners, or had hidden them. 1872. December 4. C. M. S. A. No. 363 of 1871.

No evidence was laid before us to prove that the Ráni, or those whom she represents, were or acted as such trustees, or had any claim to the temples on their estates, much less to the temple whose former existence is alleged.

The final question raised for the Ráni is whether the finder can, under the Regulation, acquire any right to the idols, inasmuch as the land in which they were found buried, or concealed, is the land of the Ráni, on which the finder had not a right to enter, and from which he had not a right to remove any portion of the land. It is, in fact, alleged that he was a trespasser at the time he became the finder, and cannot derive any advantage from his own wrong. It is not necessary to consider this objection, unless the Ráni had some right or title to the Treasure, the same as she had in the soil of the tank. But it is quite clear that to this *Treasure* the Ráni had not any title whatever, although the finder may be liable for trespass on the land. The hidden treasure belongs either to the State or to the finder. The Regulation gives to the finder the treasure, the real owner not being known or found, on his performance of certain requisites of notice to the authorities immediately after the finding. This notice was, in fact, given, and the State does not claim them. I am of opinion, therefore, that the finder is entitled to them, and that the decree of the Civil Judge must be sustained and the appeal dismissed, but, considering the novelty of the question, I think each party should bear his and her own costs of the appeal.

I should add that the finding of the treasure appears to be quite fortuitous, and the decision of this case does not involve the supposed proposition that any trespasser may wilfully commit trespass on the lands of another in search of treasure.

Appeal dismissed.

Appellate Jurisdiction. (a)

Regular Appeal No. 115 *of* 1872.

MUTHUMADE'VA NAIK......................*Pauper Appellant.*
SEVATTAMUTHUMADE'VA NAIK..............*Respondent.*

Plaintiff sued to recover a zamindárí from his step-brother, alleging that the zamindárí was hereditary property belonging to the family, the succession thereto being governed by the law of primogeniture; that his father died in 1859, leaving the plaintiff, defendant, and another, his sons, the former by the 1st wife, and the latter two by the 2nd wife; and that the defendant (respondent) unlawfully enjoyed the estate, while plaintiff, as the eldest son, had a legal claim thereto. In defence it was pleaded that the claim was *res judicata* by the decree of the Civil Court of Madura in *Suit No.* 2 *of* 1857, confirmed by the Sadr Court in *Appeal Suit No.* 234 *of* 1859. That suit was brought by plaintiff to obtain a declaration of his status as the son of his father's Pattába Strí, or royal wife. Plaintiff's father was 1st defendant, and defendant's mother was 2nd defendant in that suit, and both denied that plaintiff was son of the Pattába Strí and affirmed that 2nd defendant was 1st defendant's 1st wife, and that her sons were preferential heirs to the zamindárí. Among the points recorded was for "plaintiff to prove his status and right as alleged," and same was set down for defendants to rebut. The Judge disbelieved that plaintiff was the son of his father's 1st wife and added "plaintiff further pleads that he is the eldest son, a position not denied, but one which cannot confer on him the status he now claims." The Judge decided that plaintiff had failed to prove that his mother was the Pattába Strí, and that he was heir to the exclusion of 2nd defendant's sons. On appeal to the Sadr Adálat the decree below was confirmed and the Court made the following observation.—"It has been attempted at the hearing of the appeal to maintain the plaintiff's right to succeed as being the eldest son. This, however, was not the position taken in the Court below, where the succession was allowed to depend on another circumstance, namely, the mother being the Pattába Strí, and the Court, therefore, hold the argument to be an inadmissible one."

Held, on Appeal, that the present Suit was barred by res-judicata, a different "caussa" to the former not having been adduced.

To the judgment reported at 3 M. H. C. R. 326-34 after the words in p. 334 "in favor of the defendant all the objective grounds of the decision which have lead to the dismissal of the suit," the following ought to be added "and without the establishment of which the suit could not have been logically or legally dismissed."

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THIS was a Regular Appeal against the decision of J. D. Goldingham, the Civil Judge of Madura, in Original Suit No. 16 of 1871.

Plaintiff brought the suit to recover from defendants, his step-brothers, the zamindárí of Madavanaickanúr Puliengulam, together with certain moveable property, alleging that the zamindárí was hereditary property belonging to the family, the succession thereto being governed by the law of primogeniture; that his (plaintiff's) father enjoyed

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the estate until 2nd October 1859, when he died, leaving plaintiff and the defendants, his sons, the former by the 1st wife Lingammál and the latter by the 2nd wife Vírachinnammál; and that the 1st defendant unlawfully enjoys the said estate, and the 2nd defendant the remaining property, while plaintiff, as the eldest of the three, has a legal claim thereto under Hindu law and usage.

The 1st defendant pleaded that the claim was *res judicata* by the decree of the Civil Court of Madura in *Original Suit No.* 2 *of* 1857, confirmed by the late Sadr Court in *Appeal Suit No.* 234 *of* 1859; that the son of Pattába Strí, or royal wife, is the next heir to succeed to the zamindárí as sanctioned by usage; that the Government must be made parties to the suit, inasmuch as they conferred the estate, which is an unsettled polliem, on 1st defendant, recognizing his rights thereto. Both defendants alleged that they were not in possession of certain portions of the moveable property described in the plaint.

The Civil Court, holding that there were two distinct causes of action which had better be tried in separate suits, one against 1st defendant for unlawfully withholding the zamindárí, and the other against 1st and 2nd defendants for being in unlawful possession of the ancestral undivided property, ordered that the plaint be divided accordingly, and the case against 1st defendant placed on its file, the other being referred to the Principal Sadr Amin for disposal.

The following issue, among others, was settled—

Whether the plaintiff is estopped by *res judicata* from bringing this suit.

Defendant produced the following exhibits—

I. Certified copy of the decree of the Civil Court in *Original Suit No.* 2 *of* 1857.

II. Do. do. of the late Sadr Court confirming do. in *Appeal Suit No.* 234 *of* 1859.

The Civil Judge delivered the following judgment—

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"This is a suit brought by plaintiff to recover the zamindárí of Madavanaikanúr Puliengulam by right of primogeniture. There is no dispute as to the relationship existing between the parties, both plaintiff and defendants being the sons of the late Zamindár, one Sunmuga Madava Naikar, by different mothers, and the plaintiff's claim is based upon his being the eldest son,—a fact which is likewise admitted by the defendants. The defence, that is to say, the only portion of it I am about to consider at present, is that the claim is *res judicata* by the decree of this Court in *Suit No.* 2 *of* 1857, and I am of opinion that it is.

On an examination of the documents filed in this case, Exhibits I and II, the only papers connected with the suit that have been preserved, I find that that suit was brought by the present plaintiff with a three-fold object, only one of which need be stated here, namely, to obtain a declaration of his status as the son of his father's Pattába Strí, or royal wife, and consequently that he would be entitled to inherit the zamindárí on his father's death, to the exclusion of the present defendant's mother and her children. The plaintiff's father was 1st defendant in the suit, and defendants' mother was the 2nd defendant, and both of them contested the action. In their answer both defendants took exception to the allegation that plaintiff was the son of 1st defendant's Pattába Strí, while they affirmed that 2nd defendant was 1st defendant's first wife, and they contended that her sons were the preferential heirs to the zamindárí, and these respective allegations were reiterated in the reply and rejoinder. Points were then recorded by the Civil Judge, and among those set down for plaintiff was "To prove his status and right as alleged," and the same was set down for 1st and 2nd defendants to be rebutted. In the judgment the Civil Judge stated that plaintiff's claim hinged upon his being the son of his father's first wife, and then, after recording his reasons for discrediting the evidence brought in support of this allegation, he added "plaintiff further pleads that he is the eldest son, a position not denied, but one which cannot confer on him the status he now

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claims." In conclusion, in the decretal part of the judgment he stated that, under the above circumstances, the Court is of opinion that the plaintiff has failed to prove that his mother was 1st defendant's Pattába Strí, and that he is 1st defendant's heir *to the exclusion of 2nd defendant's sons*, and consequently the suit was dismissed with all costs. An appeal was preferred against this decision to the Sadr Adálat (*R. A. No.* 234 *of* 1859), the appeal being defended by the 2nd defendant, for plaintiff's father died before the case came on for hearing, and the result was that the decree of the Court below was affirmed. In their judgment their Lordships make the following observation, on which plaintiff's Counsel now relies. "It has been attempted at the hearing of the appeal to maintain the plaintiff's right to succeed as being the eldest son. This, however, was not the position taken in the Court below, where the succession was allowed to depend on another circumstance, namely, the mother being the Pattába Strí, and the Court, therefore, hold the argument to be an inadmissible one."

Under these circumstances, the point I have to determine is whether the present cause of action, namely, plaintiff's right to this zamindárí, was a matter determined in that suit or not, and, if so, whether it is binding on the parties to this litigation.

It is beyond question that the exceptio reijudicatæ bars every claim which may be adverse to the matter of the judgment—"quotiens inter easdem personas eadem questio revocatur." In respect, however, of the requisites for the identity of a legal contention, two things are noticeable—(1) The exceptio falls to the ground when no identity exists, even though the subsequent action may resemble the former one, and (2) the exceptio is maintainable where the identity is actually present, though the previous point in litigation and the new one may be somewhat dissimilar. Now the argument on behalf of plaintiff is that there is not such a complete identity as should operate in bar of his suit; (1) that the question of right or origin of right involved in this case is different from the question or origin of right involved in the other;

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and (2) that there is not the same condition of parties. Upon the subject of the "question of right," his vakil contends in effect, though not in identical words, that the former suit was not decided upon the same objective grounds which are now put forward as the condition of the right which is sought to be established, and that, consequently, he is not concluded by the decree passed therein. I doubt, however, whether this is a correct interpretation of the law which the facts of the case give rise to. Plaintiff, it is true, put forth his claim in the pleadings as based upon his being the son of the Pattába Strí, but he also in argument set up his present ground of contention, namely, his being the eldest son, a position which being admitted was not put in issue, and the Judge pronounced it as a position which could not confer upon him the status he then claimed. Whether he was right or wrong in so determining, I am not called upon to express an opinion,—it is enough that this ground of legal right was a point raised and opened for decision, and that it was finally dealt with in the judgment and decree of the Court of First Instance. So far the matter is clear at all events, but what plaintiff in truth relies upon is the observations of the Judges of the Sadr Court in their appeal judgment noted before. I am not free from doubt certainly, but I think that if the Court were mistaken in the view they adopted, plaintiff should have carried the case a step further to the Privy Council. But in no case do I see that the Sadr Court advisedly shut out this question from consideration and adjudication. What they said was that they considered the argument an inadmissible one, because the position taken in the Court below was that the succession admittedly depended upon another circumstance, namely, the mother being a Pattába Strí. I think, therefore, in this respect plaintiff's contention is not maintainable.

The other question is whether the decree is binding between the parties, whether, that is to say, there is identity of subject as well as of object. The defendant was not actually a party to the former suit certainly, but it must, I think, be held that he was a privy to it. The principle of estoppel, as applied to privies, is that a party claiming through another

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is estopped by that which estopped that other respecting the same subject matter, and thus an heir, who is privy in blood, is estopped by a verdict against his ancestor through whom he claims. It is quite clear that had the former judgment gone the other way, plaintiff's father and defendant's mother would have been estopped from again agitating this question, and it is through them that defendant claims and has since inherited. Defendant was not actually a party on the record of that suit, because he was a minor at the time, but he was especially represented by his mother, and specifically mentioned as belonging to the class of persons which it was sought to exclude from the succession. I think, therefore, as a privy in blood he would have been bound by that decree, and if this is so, it completes the identity. For a very accurate and learned exposition of the law on the subject I would refer to the cases quoted in the Madras H. C. R. Vol. II, page 131, and in Vol. III. page 320, the former of which was affirmed in appeal in XI Moore, page 50, as well as to 5. M. H. C. R. page 176, and it has been my endeavour to decide this case in accordance with the principles therein enunciated:—I have only to add that the identity is not destroyed by the former suit being for a declaration of title and this being brought to recover possession. For these reasons I think plaintiff's suit must be dismissed with all costs."

The plaintiff appealed upon the following ground—

The conclusion arrived at by the Civil Judge upon the 1st issue is contrary to law, neither of the decrees pleaded amounting to an estoppel in respect of the present suit.

O'Sullivan for the appellant, the plaintiff.

Mayne for the respondent, the 1st defendant.

The Court delivered the following

JUDGMENT:—The present appeal was admitted to determine whether the suit was barred by the decision of the declaratory suit promoted against those, whom defendant represents, by the present plaintiff. The ground of denying the bar by *res judicata* is that he there put his right of inheritance

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on the ground of sonship by the Pattába Strí, and that he puts it now upon the ground that he is the eldest son of his father. It appears that this fact was before the Civil Court, which says that the fact is admittedly indifferent and not capable of conferring the status claimed. To allow this ground to be set up now would, therefore, be to do what it was sought to do in the *Shivaganga case,* set up a ground of claim which the litigant had in the previous case expressly withdrawn by his admission from the cognizance of the Court. The Sadr Court refused to listen to the point put forward in appeal because the case had not been put upon that ground. This may have meant "you shall not assert a ground of law arising "out of the facts stated, if you have not urged that ground of "law in the Lower Court," and the decision would be wrong, or it may mean "you dispensed the Court below from consider-"ing this ground and you shall not urge it now," when, according to the decision of the Privy Council, it would probably be right. If it was wrong the remedy was by appeal. Whether right or wrong, it is, as this case was treated, a decision against him.

The better opinion probably is that he would be barred whether this ground of being heir was brought forward or not. The "caussa" in the first suit was "being heir," and Paulus does not say that a new suit for the same object matter may be brought because a new basis in fact of the same "caussa" is adduced, but where there is a different "caussa." The present case seems to fall within his words "mutatam "actionem opinio petitoris non facit." In every point of view the plaintiff is, in our opinion, clearly barred, and this appeal must be dismissed with costs.

To the judgment referred to in III M. H. C.,(a) after the words "in favor of the defendant all the objective grounds of the decision which have led to the dismissal of the suit" the following ought to be added "and without the establishment of which the suit could not have been logically or legally dismissed."

Appeal dismissed.

(a) pp. 326—334.

Appellate Jurisdiction. (a)

Special Appeal No. 315 of 1872.

KACHUR SUBRAYA..............................*Special Appellant.*

BENGAL SANTAPPAIYA.......................*Special Respondent.*

Plaintiff's father and defendant entered into an agreement in 1850, by which the former delivered over certain lands to the latter in consideration of his promises to perform certain services. Plaintiff brought this suit for restoration of the land, alleging that defendant had failed to perform the services. Defendant denied failure to perform and pleaded that the contract was not revocable.

Held, in Special Appeal, reversing the decisions of the Lower Courts, that the question was whether there was in this case the offer of one performance for the other, and whether the continuous performance of the services on the one side was the presupposition of the continuous existence of the gift on the other, or whether there was a mere gift with a charge upon it, the primary intent being to give. That this was a question of construction, and that, in the present case, taking the agreement and counterpart together, there was clearly a covenant for the hereditary enjoyment of the land, to be exchanged for an hereditary performance of the services.

1872. December 20. S. A. No. 315 of 1872.

THIS was a Special Appeal against the decision of T. Subbanachary, the Acting Principal Sadr Amin of Mangalore, in Regular Appeal No. 217 of 1871, confirming the Decree of the Court of the District Munsif of Barkúr in Original Suit No. 157 of 1869.

Plaintiff's father (deceased) and the defendant entered into an agreement in 1850, by which the former delivered over certain lands and promised others to the latter in consideration of his promise to put up his dwelling near a temple of the former, and perform certain services, such as keeping accounts, etc. In this suit plaintiff alleged that as the defendant had failed to perform the services from 1864, he (plaintiff) was entitled to restitution of the land. Defendant, on the other hand, contended that he had not failed to perform the services referred to; and that the contract was not revocable.

The following is a translation of the agreement and counterpart in question [*Documents A and No.* 1].

Document A.

Swatantra Mukhtyari (deed transferring right) executed on Friday the 5th Magabahula of Saumya, corresponding to the 1st February 1850, by Kuchúr Tammaiya Senabhoy, residing at Barkúr Taluq, in favor of Bengal Saulappen residing at Bramhavar.

(a.) Present :—Holloway and Innes, J J.

1872. December 20. S. A. No. 315 of 1872.

Whereas I have to conduct, singlehanded, the management of my whole affairs, namely those of the land allotted to the service of the deity at Barkúr, called Gopaladévaru, and worshipped by me, and those of my own land, etc.—whereas it has been determined that you should be made to dwell near the (*temple of the*) said deity, and you should yourself or by employing such person on your behalf as will suit me, continue to render such assistance as you can in the writing business, etc., necessary for the management of my affairs aforesaid; and whereas I made a verbal promise, willingly and gratuitously to give you, on that account, a land yielding a net produce of Hoons 12, a year.—I have, towards the above extent of land, conveyed to you, this day, all my rights over a moiety [*Here enter the particulars thereof*] bearing a beriz of Hoons 13-4-4, and an old beriz of Hoons—inclusive of vantage, and a sist of Hoons 11-3-2 out of the land No. 1 registered in the name of Maribhatta, connected with me, bearing a sist of Hoons 22-6-4, an additional tax of Hoons 5-0-13, and Hosagame tax of Hoons 0-3-3, *i. e.* Hoons 28-0-4 in all, for which the Tharar beriz fixed is Hoons 26-8-8, together with all the appurtenances and privileges thereunto belonging. Until I shall give over to you such portion of land as would make up the above extent yielding a net produce of Hoons 12, I shall pay you, in cash, the balance left, to the exclusion of the net produce derivable from the land specified above. You should get registered in your name the aforesaid land bearing the Tharar beriz of Hoons 13-4-4: pay from the present year the said beriz to the Sarkár, and enjoy from generation to generation the above-mentioned land and all its appurtenances, such as garden, etc., by exercising all rights of ownership over the same and acting up to the terms of the counter-deed passed by you this day. You are not to sell the said land. As I have given the said land to you gratuitously, myself and my descendants are only to have the assistance rendered as above agreed upon, but not to claim the restoration of the land. Thus the Sarvasivatantra Mukhtyari deed has been executed by me of my own accord.

(Signed) TAMMAIYA SENABHOY.

1872. December 20. S. A. No. 315 of 1872.

Document No. 1.

The counterpart of the Swatantra Mukhtyari deed, executed to Tamma Samaboga of Kuchúr attached to Barkúr Taluq, by Banagalli Santhappa on the 1st February 1850 is as follows—

As, in order to conduct the whole management of the land which you have allotted to the use of the Sri Gopálakristna Dévaru at Barkúr, which is worshipped by you, and of your own private lands, you are a Vabistakari (single man), it has been determined that I should keep my residence near the said Gopálakristna Dévaru and assist you in the writing business, etc., connected with your management, either personally, or by employing on my own responsibility a man who would suit your convenience. For this purpose as you have promised to give me gratis a land yielding annually a profit of Kunterayi Hoons 12, and of which, as you have put me in possession of a land assessed at Hoons 13-4-0 and executed a Survasivathantra Mookhtyari (*deed transferring all rights*) for the same, and as you have further agreed to pay me in cash to make up the difference of the profit of 12 Hoons, which may be left after deducting the profit which shall be derived from the land now given me this day belonging to the Wurg No. 1 in the village of Hosala and assessed at Hoons 13-4-0, until you give me the remaining land to make up the deficiency of the profit of 12 Hoons, I from generation to generation, either personally or by employing on my own responsibility a man who would suit your convenience, will assist you and your generations in the writing business, etc. as aforesaid, according to your pleasure, and I will keep my permanent residence near the said Pagoda, and enjoy the land which has been given me and which will be given in future, from generation to generation. Moreover, there is no reason either for you or for your generations to say that this land which you have given me gratis and the land which you will give me hereafter, should be returned. I, and also my generations will give the assistance that could be done by us as aforesaid and enjoy (*the land*). Except this, we have no right to sell the land. Thus this counter-part has been executed.

(Signed) SANTHAPPA.

1872. December 20. S. A. No. 315 of 1872.

The District Munsif, in his judgment, said:—"Though at the time when the land alluded to by the plaintiff was given by his father to the defendant under the said karárs, it was settled that the defendant should perform the writing business and do other assistance for the management of affairs by him (plaintiff's father), yet it is clear that the land was given gratuitously. It is not stipulated therein that in the event of the defendant failing to do the assistance resolved to be done by him, the land, or the net produce thereof should be given up. Besides this, the plaintiff's father inserted a stipulation therein in strict terms to the effect that because the land had been given gratuitously, himself or his descendants should not claim the same back; and the fact that the plaintiff has no right either to claim, in opposition to the said stipulation, the land or the produce thereof, or to bring a suit claiming therein the same, is undoubted.

It is not clear from the said karárs to what extent the writing business and other assistance must be done by the defendant for the management of the affairs by the plaintiff's father or the plaintiff, as shown in the said karárs. Such an assistance cannot be expected except on amicable terms among the parties with each other, and the Court cannot compel them on that account. Hence the Court, finding that the plaintiff's claim cannot stand good, dismisses the suit with costs."

Upon appeal (by the plaintiff) the Principal Sadr Amin said—"The questions for consideration in this case are (1) whether the contract is revocable, and (2) whether there was any breach of it on part of the defendant.

With regard to the 1st point, I entirely concur with the Munsif in holding the gift of the land to the defendant to be absolute and irrevocable. The donor has clearly expressed that the land was given to the donee absolutely, to be enjoyed from generation to generation; and again explained his intention in the latter part of the deed, where he stated that the gift is irrevocable, though he can require the donee to perform the services. I am, therefore, of opinion that the plain-

tiff has no right to claim restoration of the land, as sued for. Hence I think it unnecessary to decide the second question."

The plaintiff preferred a special appeal upon the following grounds, among others :—

I. The Lower Courts have misconstrued the agreement in question.

II. The defendant not having acted up to the terms of the said agreement, the plaintiff is entitled to the lands in dispute under the agreement in question.

III. Even if the document in question should be supposed to contain no *express* provision for the restoration of the lands in the event of the services not being properly performed, such provision must necessarily be *implied* from the nature of the contract.

IV. A suit for damages by the plaintiff, even if it should be successful, would not afford adequate relief to the plaintiff.

Sanjiva Rau for the special appellant, the plaintiff.

The Court delivered the following judgments :—

HOLLOWAY, J. :—The question is whether there is in this case the offer of one performance for the other, and whether the continuous performance of the services on the one side is the presupposition of the continuous existence of the gift on the other, or whether there is a mere gift with a charge upon it, the primary intent being to give.

The English lawyer would say—Are the covenants upon the one side the entire and indivisible consideration for those on the other ? This is a question of construction, and, taking the two documents together, it seems clear to me that there is a covenant for the hereditary enjoyment of the land to be exchanged for an hereditary performance of the services. To fasten, as the Principal Sadr Amin does, upon some words at the end of the one document without so interpreting it with the remainder, is to violate a plain rule of construction. The words are—" As I have given the said land to you gratuitous-" ly, myself and my descendants are only to have the assis-

1872 December 20. S. A. No. 815 of 1872.

"tance rendered as above agreed upon, but not to claim the "restoration of the land. Thus the Sarwaswatantra Mukhtyar "deed has been executed by me of my own accord." When read with the rest of the documents on both sides, they merely mean—'this shall be no gift defeasible by me or my heirs, but the land is yours on the terms above agreed upon.' The two documents shew those terms.—'I want assistance in my business. You have agreed to render it or cause it to be rendered from generation to generation. In return you shall enjoy the land but without the power of alienation'—A stipulation strongly enforcing the construction to which the words themselves lead, that the continuous enjoyment was on the presupposition of the continuous performance. There may, of course, be cases in which the nonfulfilment may be merely ground for the demand of the sum which ought to be applied. The legatum sub modo is an example. Where the legatee refuses to perform the modus, he is liable to the restoration of the sum which requires to be applied to the purpose. Where, however, even here, the duty is not the expenditure of money and the performance refused, entire restitution can be required, and simply because there is no room for a measure of the non-performance (compare Puchta Pand. Sec. 533; Arndts Pand. 533 with Scheurl Nebenbestimmungen 255.)

The intent apparent upon the two documents taken together is that the continuous enjoyment of the land shall be exchanged for the continuous performance of the services. I would, therefore, reverse the decree of the Principal Sadr Amin and of the Munsif, and direct the latter to try the case in the regular manner, as the judgment upon the preliminary point is erroneous. The question to be tried is "whether "there have been on the defendant's part neglect and refusal "to perform or get performed the services mentioned in the agreement."

The costs of this appeal should be provided for in the judgment.

INNES, J. :—I have already expressed my opinion in accordance with this construction of the documents and agree to the disposal of the case in the manner proposed.

Appellate Jurisdiction. (a)

Regular Appeal No. 118 *of* 1872.

IMMEDY KANUGA RA'MA'YA GAUNDAN......*Appellant.*

RA'MASWA'MI AMBALAM....................*Respondent.*

Plaintiff brought this suit to obtain a decree dismissing defendants, Committee and Manager of a certain Pagoda, from their offices on the ground of malversation. The Court made an order expressed to be by consent of the parties concerned, and in exercise of the Court's discretionary power under Section 16 of Act XX of 1863, referring the matters in difference to three arbitrators for final determination, said arbitrators "to make their award in writing and submit the same" within a certain period. Each arbitrator delivered a separate award in writing, two arbitrators finding for the plaintiff. The Civil Judge made a decree in accordance with the award of the majority of the arbitrators. The 1st defendant appealed on the grounds (1) That he had not consented to the arbitration, and (2) that there being no provision in the order of reference to the effect that the finding of a majority of the arbitrators should prevail, there was no valid award. *Held*, that, in this case, the order of the Judge was valid without the assent of the persons to be bound. That he might, when he made the order, have inserted as a provision that the decision of the majority should be that of the body, and that there was no reason why his ratification of that mode of decision, wholly within his discretion, should not be equivalent to a previous command.

THIS was a Regular Appeal against the decree of J. D. Goldingham, the Civil Judge of Madura, in Original Suit No. 27 of 1870.

1872. *December* 20. *R. A. No.* 118 *of* 1872.

The plaintiff, as a person interested in the Kullalagur dévastánam, brought the suit, having obtained the leave of the Court as required by Section 18, Act XX of 1863, to obtain a decree dismissing the defendants from their offices as members of the Committee and Manager, respectively, and further adjudging them to pay to the dévastánam Rupees 16,124-8-0, being loss sustained on account of their illegal and unwarranted acts, such as increasing the establishment unnecessarily, and to benefit their dependents usurping the jewels and the money belonging to the pagoda, and misappropriating to themselves the pagoda funds under pretence of making loans to insolvents, of which the plaintiff became aware in 1869.

The defendants, generally, denied the allegations in the plaint. The Civil Court, by the following order of the 29th

(a) Present ;—Holloway and Kindersley, JJ.

1872. December 20. R. A. No. 118 of 1872.

September 1871, referred the matters in difference between the parties to arbitration :—

" Upon reading the Petition presented by the plaintiff and his Vakil, and by 2nd, 3rd and 5th defendants, and Mr. J. French, Vakil for the said 2nd and 5th defendants and for 1st and 4th defendants, who, he says, concur in the said Petition.— It is ordered by and with the consent of the parties present and in the exercise of the Court's discretionary power under Section 16 of Act XX of 1863 that all matters in difference in this suit be referred to the final determination of (1) Nilakunta Shastri, (2) Mr. G. Hickey, and (3) S. Subramania A'yyar, who are to make their award in writing and submit the same to this Court, together with all proceedings, depositions and exhibits in this suit within two months from the date hereof. And it is ordered further, by and with the like consent, that the said arbitrators are to be at liberty to examine the parties and their witnesses upon oath or affirmation, which they are empowered to administer, and that the said arbitrators shall have all such powers or authorities as are vested in arbitrators under Act VIII of 1859, including therein power to call for all books of account that they may consider necessary. And it is further ordered, by and with the like consent, that the costs of this suit, together with the costs of reference to arbitration, up to and including the award of the said arbitrators, do abide the result of the finding of the said arbitrators."

In accordance with this reference the arbitrators, on or about the 5th March 1872, delivered their opinions, separately, in writing. Objections to the award were raised by several of the parties to the suit, among others by the 1st defendant, who alleged that he had not agreed to the submission to arbitration, and refused to be bound by the award.

The Civil Judge delivered a judgment from which the following is taken :—

" Objections have been raised against the award of the arbitrators by plaintiff, 1st, 2nd, and 4th defendants, respectively. No award can be set aside under Section 324 of the

Code, unless corruption or misconduct be proved against the arbitrators, or umpire. None such being even imputed, it follows that the Court must decree in each item, or matter in dispute, in accordance with the opinion expressed by the majority of the arbitrators."

The 1st defendant appealed on the following grounds :—

1. The reference to arbitration in the suit and the award purporting to be made thereunder are invalid.

2. The reference to arbitration was made upon the application of the plaintiff and some of the defendants under Act VIII of 1859, and the arbitrators were nominated by the applicants. The 1st defendant did not join in that application, and is, therefore, not bound by the award.

3. The order of reference contained no provision that the arbitrator should deliver separate awards, or that the decision of the majority should prevail. The arbitrators not having agreed, there is, therefore, no valid award.

4. The findings of the majority of the arbitrators do not disclose such conduct on the part of the 1st defendant as warrants his removal from office under Act XX of 1863.

Handley for the appellant, the 1st defendant.

The Court delivered the following

JUDGMENT :—In this case, as in all such cases, it is to be regretted that the order to refer did not embody the mode in which the decision should be arrived at; whether a majority should decide, or, in case of difference, an umpire. It is unnecessary to determine in this particular case whether into such a submission by agreement, the principle should be imported that where an act is to be done by a body, the act of the majority of the units of that body is the act of the body. Here the order of the Judge was valid without the assent of the persons to be bound. There can be no doubt that he might, when he made the order, have inserted as a provision that the decision of the majority should be that of the body, and there is no reason why his ratification of that mode of decision, wholly within his discretion, should not be equivalent to a previous

1872. December 20. R. A. No. 118 of 1872. command. Without, therefore, at all saying that the argument in appeal ought in any case to prevail, we are clear that it ought not in this case. The appeal will be dismissed.

Appeal dismissed.

Appellate Jurisdiction. (a)

Special Appeal No. 251 *of* 1871.

SA'MI A'YYANGA'R................*Special Appellant.*

GOPA'L A'YYANGA'R...............*Special Respondent.*

Defendant executed in favor of plaintiff at Combaconum, in the Zillah of Tanjore, a deed of mortgage of lands situated at a place within the jurisdiction of the District Munsif of Perambalúr, in the Trichinopoly Zillah. The deed, to make it enforceable, required registration, the place of registry (from the situation of the lands) being Perambalúr. Plaintiff appeared at the registry office, but defendant did not. In consequence the Sub-Registrar refused to register the deed. The present suit was brought to compel defendant to join in registering it. The District Munsif of Perambalúr dismissed the suit upon the ground that the cause of action did not arise within his jurisdiction, but at Combaconum. The Civil Judge confirmed this decision, as he found that the defendant was a permanent resident of Combaconum. Upon Special Appeal, *Held*, reversing the decree of the Civil Judge, that as Section 21 of the Registration Act (XVI of 1864) which governed this case, rendered it necessary that the deed should be registered in Perambalúr, the defendant was under an obligation to plaintiff to get the document registered at that place; that the breach of this obligation was the cause of action, and that, consequently, the Court at Perambalúr had jurisdiction, as it was the place of the fulfilment of the obligation.

1873. January 6. S. A. No. 251 of 1871. THIS was a Special Appeal against the decision of R. Davidson, the District Judge of Trichinopoly, in Regular Appeal No. 32 of 1869, confirming the revised decree of the Court of the District Munsif of Perambalúr in Original Suit No. 156 of 1866.

The facts appear in the following judgment of the Lower Appellate Court:—

"Plaintiff brought this suit to compel registration of a certain document.

The plaint set forth that on the 2nd January 1866, the defendant, a resident of Combaconum, executed a deed of mortgage to him at Combaconum for certain lands situated within the jurisdiction of the Perambalúr Munsif's Court,

(a) Present:—Morgan, C. J. and Innes, J.

and that as the defendant failed to appear in order to have the document registered before the Deputy Registrar, the plaintiff sued to compel the defendant to register it.

1873. January 6. S. A. No. 251 of 1871.

The defendant was ex-parte.

The Munsif dismissed the suit under the latter part of Section 5 of the Civil Procedure Code, as he held that the plaintiff ought not to have instituted the suit in his Court, because the plaintiff himself admitted that the defendant was a regular resident of Combaconum, in the Tanjore district, where the instrument Exhibit A was admittedly executed, and because the suit was not brought to recover the land.

The plaintiff appealed, and the late Acting Civil Judge remanded the case for the determination of the issues as to where the defendant really resides, and whether the lands in question were situated within the jurisdiction of the Perambalúr Munsif or not.

The Munsif found that the original plaint set forth that the defendant was a resident of Combaconum, which was the case, and that as set forth in his original judgment, the lands in question were situated within the Munsif's jurisdiction, but for the reasons originally assigned and adverted to in para. 5 of this judgment, he adhered to his original finding, and dismissed the suit with costs.

Inasmuch as it appears that the defendant was a permanent resident of Combaconum at the time when he executed the instrument A at Combaconum, I am of opinion that the Perambalúr Court was not that in which this suit ought to have been brought, and as no sufficient cause has been shown to warrant me in disturbing the Munsif's decision, it is affirmed, and this appeal dismissed with costs. Had the lands themselves formed subject matter of contention, the case would have been very different."

The plaintiff appealed.

Rama Rau for the special appellant, the plaintiff.

The Court delivered the following

JUDGMENT :—The question in this special appeal is whether the District Munsif of Perambalúr had jurisdiction to entertain the suit. The facts are as follows :—

1873. January 6. S. A. No. 251 of 1871.

The defendant executed in favor of plaintiff at Combaconum, in the Zillah of Tanjore, a deed of mortgage of lands situated at a place within the jurisdiction of the District Munsif of Perambalúr in the Trichinopoly Zillah. The mortgage deed was one which, to make it enforceable, required to be registered, the place of registry (from the situation of the lands) being Perambalúr. Plaintiff appeared before the Sub-Registrar, but defendant did not appear, and the Sub-Registrar, consequently, refused to register the document.

The suit is brought to compel defendant to join in registering it. The District Munsif of Perambalúr dismissed the suit, as he was of opinion that the cause of action did not arise within his jurisdiction. He considered that it arose at Combaconum. The Civil Judge, on appeal, confirmed this decision, as he found that the defendant was a permanent resident of Combaconum. To be available as a valuable security the document required to be registered, and Section 21 of the Registration Act of 1864 (by which registration in this case was governed) rendered it necessary that it should be registered in Perambalúr. The defendant was, therefore, under an obligation to plaintiff to get the document registered at that place. The breach of this obligation is the cause of action, and although, of course, if the suit had been brought at Combaconum, the Court there would have had jurisdiction, by reason of the residence there of the defendant, the question now is whether there is not also jurisdiction at Perambalúr, where the plaintiff has brought his suit, by reason of the cause of action having arisen within the local limits of the Court of the District Munsif of Perambalúr. And this was and is the sole question to be determined, because, if there is jurisdiction at Perambalúr, it does not matter where the defendant resides. We think that the proper forum of the obligation was Perambalúr, as, from the nature of the act to be performed, it was the place of the fulfilment of the obligation. We, therefore, reverse the decrees and remand the suit for disposal on the merits. The costs will be costs in the cause.

Appeal allowed.

Appellate Jurisdiction. (a)

Civil Miscellaneous Regular Appeal No. 406 *of* 1872.

THATHU BAPUTTY.................. .....*Appellant.*

CHAKAYATH CHATHU......................*Respondent.*

The Civil Judge removed two children, governed by the rule of Márumakatáyam, from the custody of their Karnavan, and placed them under the guardianship of their father. *Held* by the High Court, on appeal, that the order should be reversed on the grounds that no case had arisen for the exercise of the Civil Judge's power, and that the order was wholly opposed to the very principle upon which Márumakatáyam depends.

THIS was an appeal against the order of J. W. Reid, the Civil Judge of Tellicherry, dated the 11th September 1872, passed on Miscellaneous Petitions Nos. 303 and 359 of 1872.

1873. *January* 22. *C. M. R. A. No.* 406 *of* 1872.

Miscellaneous Petition No. 303 of 1872 was presented on behalf of Chakayath Chathu praying, under Act IX of 1861, that the two minors, children of petitioner by his deceased wife Cháyichi, may be ordered to be restored to petitioner by the counter-petitioners, who, he alleged, had forcibly taken possession of them.

Counter-Petition No. 359 of 1872 was presented by Thatha Unni, one of the two counter-petitioners.

Upon reading these petitions and hearing the evidence adduced and the arguments of the vakíls on behalf of the several parties, the Civil Judge made the following order :—

"The question to be decided is who is entitled to take charge of the children of a deceased woman who followed the rule of nephews. The criminal law requires the father of a child unable to maintain itself to maintain it (Section 316, Criminal Procedure Code) and the natural equity found in most positive law entitles a father to be the guardian of his children, and enforces the burden of maintaining them on the father:

Does the rule of nephews form any exception to this general rule ?

I know of no direct precedent, unless it be a dictum of the High Court in 4 M. H. C. R. 203, where in *Subba Hegade*

(a) Present :—Morgan, C. J. and Holloway, J.

1873. January 22. C. M. R. A. No. 406 of 1872.

v. *Tongu* (a case affected by the kindred system of A'lyasantána) the High Court observed—"It does not follow, as the Civil Judge remarks in his judgment, that a husband is not bound to afford necessary maintenance to the woman from his self-acquired means, so long as she continues to live with him as his wife. It will, probably, be found that the general law does impose such an obligation, but, even supposing it does not, still, his non-liability to support her could not in any way alter the legal effect of the wife's residence with him, or her right to maintenance out of the property of her family."

There is some analogy between these cases—but the chief value of the case is as showing the extent to which the kindred systems of A'lyasantána and Márumakatáyam affect the relations of those living under it. The fact that a wife lived with her husband, and could, while doing so, look to her husband for maintenance, was held in no way to alter the effect of the A'lyasantána rules as to the right of one voluntarily separating from the family to claim maintenance.

In a similar way, I think, from recorded cases is to be gathered that the rule of nephews simply confers on the members a right to maintenance in the family house, but not out of it. I do not see it gives a right to the Karnavan to force the adult members to live in the family house, though, if they come to it, it binds him to maintain them, and I see no difference in the matter of minors, if they wish to go from under the tarwád roof. I think they may, and in the same way I see nothing to take away from the father the natural right, which, in absence of any rule of the common law of the country, he must be supposed to have, of taking care of, and enjoying the society of his own children.

I therefore order the Karnavan of the children, Petitioner in No. 359, to deliver the children to the Petitioner in No. 303, their natural father. Each party will bear their own costs."

Against this order, the counter-petitioner Thathu Baputty appealed to the High Court on the ground that—

By the law applicable to the case the appellant was entitled to the custody and possession of the children.

1873. *January* 22. *C. M. R. A. No.* 406 *of* 1872.

Shephard for the appellant.

Ormsby for the respondent.

The Court delivered the following

JUDGMENT :—In this case the Civil Judge has removed two children, governed by the rule of Márumakatáyam, from the custody of their Karnavan, and placed them under the guardianship of their father.

He has done this, he says, upon principles of natural equity to be found in other systems of positive law. In all systems of positive law, the pre-supposition to the exercise by the State, acting through the Courts, of the power of appointing a guardian is that there shall be no guardian existing by the provisions of the law itself ("Tutela legitima" or "testamentaria") "quia tutorem habenti tutor dari non potest."

In the present case, by the principles of the law of Malabar, the mother herself while alive and her children too were under the guardianship of the head of the family—the Karnavan. Their position was precisely analogous to that of the members of a Roman family under the patria potestas. The Karnavan is as much the guardian and representative, for all purposes of property, of every member within the tarwad as the Roman father or grandfather.

Moreover, the relation of husband and wife does not, in Malabar, disturb this condition. These children have no claim whatever upon the property of their father, but their rights are entirely in that of their Karnavan's family. There is no doubt at all that he was, during the mother's life-time, and continues to be, after her death, the legitimate guardian of these children, and that the father has by positive law not the smallest right to their custody. On the grounds that no case had arisen for the exercise of the Civil Judge's power, and that the order is wholly opposed to the very principle upon which Márumakatáyam depends, we reverse the order with costs.

Order reversed.

Appellate Jurisdiction (a)

Criminal Petition No. 410 *of* 1872.

C. NARA'YANASA'MI A'YYAR.................*Petitioner.*

The Courts of the Head Assistant Magistrate and of the Deputy Magistrate have jurisdiction to try a District Munsif on charges of extortion in the course of the exercise of his judicial functions. The Sessions Judge is a proper person to sanction the prosecution.

By INNES, J.—The rule (laid down in Sec. 8, Reg. VI of 1816) requiring the committal of such cases to the Court of Session, has been impliedly, though not expressly, repealed.

1873. *February* 19. *C. P. No.* 410 *of* 1872.

THIS was a Petition under Section 404 of the Old Criminal Procedure Code, praying the High Court to revise the proceedings held by the Court of Session of Tellicherry in Criminal Petitions Nos. 9 and 10 of 1872, presented against the sentences passed in Case No. 70 of 1872 on the file of the Acting Head Assistant Magistrate, and Case No. 60 of 1872 on the file of the Deputy Magistrate of South Canara.

O'Sullivan for the Petitioner.

The *Government Pleader* in support of the conviction.

The facts of the case and the arguments of Counsel are set forth in the following judgments.

INNES, J.—This is a Petition to the High Court praying that we will call for two records, under Section 405 of the criminal Procedure Code, and set aside the sentences passed by the Courts of First Instance.

The cases were tried by the Acting Head Assistant Magistrate (Calendar 70) and the Deputy Magistrate (Calendar 60) of South Canara. The accused, a District Munsif of South Canara, was convicted, in each case, on a charge of extortion in the course of the exercise of his judicial functions. On the application of the Petitioner, his appeals from these decisions were transferred by the High Court to Tellicherry, and came on before the Sessions Judge of Tellicherry, who dismissed the appeals.

The grounds upon which the present application is based are that the Courts of the Assistant Magistrate and Deputy Magistrate had no jurisdiction to try the cases.

(a) Present :—Innes and Kindersley, J J.

Several points were argued before us which I will take in order.

First, it was said that the District Munsif under Clause 2, Section 8, Regulation VI of 1816, and Section 23 of Act VII of 1843, was not amenable to any but the Zillah Court for the offences charged.

Clause 2 of Section 8, Regulation VI of 1816, is to the following effect:—"District Munsifs shall also be liable to a criminal prosecution for extortion or other acts of oppression committed by them in the discharge of their duty, and, on conviction before the Court of Circuit, shall be subject to fine and imprisonment proportionate to the circumstances of the case, but no Munsif shall be liable to be prosecuted for want of form or for error in his proceedings or judgments, nor shall any process be issued against a Munsif who may be charged with extortion or any oppressive or unwarranted act of authority, unless the Judge shall be previously satisfied by sufficient evidence that there is reason to believe the charge to be well founded."

At the date of this Regulation, extortion was already punishable as a misdemeanor under Muhammadan Law, and any person charged with this offence was liable to be tried and punished by the Court of Circuit under Clause 7, Section 2, Regulation XV of 1803, the limit of punishment being 195 stripes and 7 years' imprisonment.

The offence being one against the Muhammadan Law, which was the general law of the country, this Section cannot be said to have created the offence, nor can the offence be said to be an offence against a special or local law. As regards the substantive law the Section is merely declaratory, but it embodies rules of procedure applicable to charges of this nature brought against District Munsifs, which have not as yet been expressly repealed. One of these rules is that a District Munsif must in such a case be committed to the Court of Circuit (now the Court of Sessions). Another rule is that before any process is issued, the Judge shall be satisfied by sufficient evidence that the charge is well founded. With regard to the former of these rules, it is necessary to see whe-

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ther the authority of it has been affected by the Code of Criminal Procedure. On the introduction of the Indian Penal Code offences punishable under it (not being offences against special or local laws) had to be dealt with, as has been properly done in these cases, under the Penal Code. The late Code of Criminal Procedure, Section 21, gave the several Courts jurisdiction over offences "according to the powers vested in them respectively by this Act," and we find that extortion is an offence punishable by the grades of Magistrates by whom these cases have been tried; but the question is, whether the words of Section 8 of Regulation VI of 1816, not having been expressly repealed, can stand as an exception to the general law, as promulgated in Section 21 of the late Code of Criminal Procedure. It appears to me that they cannot. The scope of the Act and the words of Section 21 seem to exclude the supposition that any exception in point of procedure in the administration of the general substantive law could have been contemplated, and this appears more clearly if we turn to the Chapter (XI) in which due provision is made for prosecutions in charges against officers in the position of a District Munsif. It seems to me, therefore, necessary to hold that the rule requiring the committal of such cases to the Court of Sessions, has been impliedly, though not expressly, repealed.

Then, as to the question whether the latter part of Section 8 of Regulation VI of 1816 controls the procedure in regard to giving sanction—The words are "nor shall any process be issued against a Munsif charged with extortion or any oppressive or unwarranted act of authority, unless the Judge shall be previously satisfied by sufficient evidence that there is reason to believe the charge to be well founded." The words "the Judge" appear to mean the Judge of the Court of Circuit previously mentioned, and the language seems to amount to a direction of the law prohibiting, if it is still in force, the entertaining of charges against District Munsifs hastily and without a sufficient enquiry. The violation of this direction by the Magistrate or other officer proceeding with the case, however culpable, would not, I conceive, vitiate the trial, and looking to the comprehensive scope of Section 167,

Criminal Procedure Code, it seems very doubtful whether that Section does not amount to an implied repeal of the provisions of this part of Section 8, Regulation VI of 1816.

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It was further contended that, assuming the case to be cognizable by the Magistracy, the sanction of Government was necessary under Section 167 of the Code of Criminal Procedure. The Section only requires the sanction alternatively of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or other public servant is *subordinate,* and whose power so to sanction or direct such prosecution, the Local Government shall not think fit to limit or reserve.

I agree with the opinion expressed by Holloway, J., as reported in p. 58, Vol. VII, High Court Reports, in which Kindersley, J., concurred, as to the interpretation of this Section. The power of sanction resides in the Zillah Judge, unless it has been limited or reserved by the Local Government. It has not been so limited or reserved. He has, therefore, the power to give sanction for the prosecution of his subordinates.

Another point urged, with reference to Calendar Case 60, was that the suit in which the offence is said to have been committed by the District Munsif as Judge was a Small Cause Suit, and that, as Judge of a Small Cause Court, he is not subordinate to the Zillah Judge but to the High Court.

The cases at pages 18 and 191, Vol. VI, High Court Reports, were quoted as directly bearing out this contention.

The case at p. 18 is one in which the Zillah Court was held incompetent to transfer Small Cause Court Suits from the Munsif's to the Principal Sadr Amin's Court for the purpose of being tried by him as Small Cause Court Judge.

That at p. 191 was a decision upon the question whether the Zillah Courts could sanction a prosecution for forgery which had been committed in a suit on the Small Cause side of a Principal Sadr Amin's Court. In both these cases the view taken is that the Principal Sadr Amin presided over two Courts, one with ordinary and the other with a Special Small Cause jurisdiction, as, to exercise the latter jurisdiction, a

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Principal Sadr Amin requires to be specially vested by the Government with the necessary powers, which are not inherent in his functions as Principal Sadr Amin. As in the exercise of these powers the Principal Sadr Amin's Court is not required to make returns to any but the High Court, it was held that the Principal Sadr Amin's Court, as a Small Cause Court, was not subordinate to the Zillah Court within the meaning of Section 6 of the Civil Procedure Code and Section 170 of the Criminal Procedure Code.

For the application of these Sections the *Court* must be subordinate; and the use of the word *Court* in Section 170 of the Criminal Procedure Code may be noticed as a distinction between that Section and Section 167, in which the word used is '*Judge*.'

The constitution of a Munsif's Court as a Small Cause Court, at present, differs from that of a Principal Sadr Amin. As a District Munsif, his Court is subordinate to that of the Zillah Court, and by virtue of his very appointment as a District Munsif, he is vested with jurisdiction to exercise Small Cause powers. All that Section 167 requires is that the Court giving sanction should be one to which the Judge charged with the offence is subordinate, and it is difficult to see how the modification of some of a District Munsif's powers can operate without special provision to that effect to remove him in the exercise of those powers from subordination to the Zillah Court. When the Courts of the District Munsifs were first created, their decisions were to be final in certain cases, some of which included decisions in suits for land within a certain limit of value. By Regulation V of 1825, these final powers were somewhat abridged, all decisions in suits for land being made appealable, but decisions in suits for other real property within 20 Rupees value, and in suits for personal property up to 20 Rupees value continued final. The effect of the Small Cause Court jurisdiction, as regards District Munsifs, was merely to extend the final jurisdiction to 50 Rupees in such suits for money or personal property as were Small Cause Court Suits, and to introduce a more simple procedure in regard to them. It does not appear that the

Act which, once for all, conferred those powers on District Munsifs as District Munsifs, in any respect modified their general subordination as Judges to the Zillah Court.

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Then with regard to the question of sanction.

1. Was sanction given in each case?

2. Was it in time, assuming it to be essential that sanction should precede the earliest proceedings in the trial?

Owing to a formal sanction not having been in each case placed upon the record, we have had great difficulty in arriving at a satisfactory conclusion on these points.

It now, however, appears that No. 60 on the file of the Deputy Magistrate is No. 64 B on the file of the Magistrate, and that the complaint in that case was received by the Magistrate on the 5th September. Sanction to proceed with this case was accorded by the letter of the Sessions Judge of the 23rd September, and the first proceeding was held on 12th October. The sanction, therefore, was in time, if in terms it was sufficient. It is impossible to say, taking the language of the letter of the Sessions Judge, that the sanction, however general, is not in terms a compliance with the law. The Sessions Judge had already sanctioned the prosecution of the District Munsif in other similar cases, and had, therefore, sufficient before him to enable him to determine upon the propriety of extending sanction to other cases. I think the sanction was in terms sufficient. In Case No. 70 before the Head Assistant Magistrate (which is 60 B, file 101, of the Magistrate's file) the complaint was preferred on the 3rd September, and the complainant was examined on the 4th: sanction to prosecute was conveyed on the 5th September, and the first proceeding was held on the 20th September before the Head Assistant Magistrate. The examination of the complainant is not, I think, such an entertaining of the complaint as is intended by the Section. The complaint must be understood before sanction to entertain it can be sought, and it is often necessary to examine the complainant before the complaint can be understood. I think, therefore, that sanction in this case also was given, and that it was given in time.

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I would dismiss the Petition.

KINDERSLEY, J :—In these cases I concur generally in the judgment of Mr. Justice Innes. The offences of which the District Munsif was convicted were not charged under any special or local law, but under the Indian Penal Code; and, therefore, the procedure upon the trial of such charges was properly regulated by the Code of Criminal Procedure, and the sanction requisite for the trial of such charges is laid down in Section 167 of the same Code. I am unable to conclude that in respect of charges made under the Penal Code against a District Munsif, the Legislature intended that the sanction should be regulated both by the Code of Criminal Procedure, and also by the old Regulation. The more recent legislation covering the same ground must, I think, be taken to supersede the old procedure in respect of offences against the Penal Code, and other offences to which the Code of Criminal Procedure applies.

I am also of opinion that the Civil and Sessions Judge was a proper person to give the sanction. Whatever may be the powers of a District Munsif as a Judge of Small Causes, I have no doubt that, personally, he is subordinate to the Civil and Sessions Judge of the district. His appointment depends on the recommendation of the Civil Judge, and he may be suspended by the same authority, and all correspondence regarding the leave, retirement, removal, or dismissal of a District Munsif, passes through the Judge's hands. I am, therefore, clearly of opinion that, personally, the District Munsif was subordinate to the Civil Judge, and a prosecution of this kind is a personal matter not affecting jurisdiction. The great difficulty in this case has been to arrive at the facts as regarded the sanction. But, upon the last return of the Judge of Tellicherry, I agree that the sanction was given in both cases in time. I also agree that the general terms of the sanction in the letter of the 23rd September are sufficient.

I therefore agree that this Petition ought to be dismissed.

Petition dismissed.

Original Appellate Jurisdiction. (a)

Appeal No. 14 of 1872.

GUDDALUR RUTHNA MUDALIYAR..............*Appellant.*
KUNNATTUR ARUMUGA MUDALIYAR... ... ...*Respondent.*

Suit for balance of principal due for money lent, with interest thereon at 5 per cent., per mensem. It appeared that the defendant, being indebted to plaintiff on a promissory note for Rs. 500, applied to him for a further loan of Rs. 1500, proposing to lay out the whole amount of Rs. 2000 in the performance of a contract then subsisting between himself and the Madras Railway Company and offering to give plaintiff a share in such contract: that plaintiff consented to lend the said sum payable with interest at 6 or 7 per cent., per mensem, in lieu of becoming a partner, and also to give defendant two months' previous notice on requiring repayment of the loan. Defendant demurred to the rate of interest, which he said he would further consider on his return to Cuddapah, but, being in immediate want of the money, proposed to borrow it on a promissory note. Plaintiff, accordingly, on the 13th October 1870, lent defendant Rs. 1500, and obtained, in lieu of the note for Rs. 500, which was returned, a promissory note for Rs. 2000, payable on demand, with interest at 12 per cent. per annum, which note, plaintiff alleged, it was agreed should be cancelled on receipt of a letter from the defendant fixing the rate of interest (this was denied by defendant). Defendant subsequently wrote two letters to plaintiff, agreeing to pay interest at 5 per cent. per mensem, and plaintiff endorsed the said note as cancelled. Plaintiff also alleged that he received interest at the rate of 5 per cent. per mensem for two months, and produced a witness who deposed to that effect. This defendant denied.

Held by the Original Court (following *Abrey* v. *Crux*) (b) that the oral evidence was inadmissible to show the rate of interest *dehors* that of the pro. note, and that the subsequent letters, offering a higher rate of interest, were without consideration, for there was not any evidence of forbearance, and that the plaintiff had a right to sue on the promissory note the very day after it was made.

Plaintiff appealed on the ground that the evidence was admissible.

Held, by MORGAN, C. J. that the evidence was admissible. That the law is that notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find, upon sufficient evidence, that this writing is not really the contract. And the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it. That, in this case, at the time of the advance of the money there was an agreement touching the transaction of loan, although the rate of interest was still unsettled and under discussion. The plaintiff declined to lend on the terms of a joint interest in the venture as proposed by the defendant, and the latter refused to pay the rate demanded. Before any final agreement, and while the transaction was still incomplete, the note was given, not as a writing which expressed or was meant to express the final contract, but rather as a voucher, or a temporary and provisional security

(a) Present :—Morgan, C. J. and Kernan, J.

(b) L. R. 5 C. P. 37.

for the money pending the discussion respecting the rate of interest. And that if the note was thus given and received, it should not be regarded as the contract between the parties, or as a written contract excluding other evidence of the true contract.

By KERNAN, J. (concurring with the Chief Justice as to the admissibility of the evidence) that assuming that the promissory note did represent a complete contract between the parties, such contract was waived and discharged by the acts and agreement of the parties before breach, and a new contract, namely, the contract for larger interest, substituted.

Abrey v. *Crux* distinguished.

1872. *August* 15. *A. No.* 14 *of* 1872.

THIS was an appeal from so much of the decree of Holloway, J., made in Suit No. 90 of 1872, as disallowed the sum of Rs. 1,467-15-1.

The plaintiff claimed payment of Rs. 1,675-12-1, balance of principal due for money lent, and interest at 5 per cent. per mensem on the balance from 6th February 1872 until payment.

The plaint set forth that the defendant, being indebted to the plaintiff on a promissory note for Rs. 500, applied by letter from Cuddapah, dated 4th October 1870, for a further loan of Rs. 1,500, proposing to lay out the whole amount of Rs. 2,000 in the performance of a contract then subsisting between himself and the Madras Railway Company, and offering to give the plaintiff a share in such contract, on learning by telegram that he was willing to accept the same. The plaintiff accordingly telegraphed, and, on the return, almost immediately afterwards, of the defendant to Madras, the plaintiff consented to lend the defendant the said sum of Rs. 1,500, payable with interest at 6 or 7 per cent. per mensem, in lieu of his becoming a partner with the defendant in his contract aforesaid, and also to give the defendant two months' previous notice on requiring repayment of the loan.

The defendant agreed to all the above terms, except so much as related to the rate of interest, which he said he would further consider on his return to Cuddapah and write to the plaintiff accordingly, but in the meanwhile he wanted the plaintiff to lend him the money on a promissory note.

The plaintiff, accordingly, on the 13th October 1870, lent the defendant at Madras the said sum of Rs. 1,500, and obtained, in lieu of the note for Rs. 500 which was returned, a promissory note for Rs. 2,000, payable on demand, with interest at 12 per cent. per annum, and which note, it was agreed, should be subsequently cancelled on the receipt of a letter from defendant fixing the rate of interest.

The defendant subsequently wrote two letters to the plaintiff, dated respectively the 19th October and the 10th November 1870, agreeing to pay interest at 5 per cent. per mensem, whereupon the plaintiff endorsed the said note for Rs. 2,000 as cancelled.

The plaintiff in April 1871 gave the defendant two months' notice as agreed upon.

The defendant, by his written statement, admitted applying to plaintiff for a further loan of Rs. 1,500, proposing to give plaintiff a share in a contract which then subsisted between himself and the Madras Railway Company. Plaintiff did not accede to his proposal, but agreed to lend defendant the aforesaid sum on his executing a promissory note for Rs. 2,000 including the former loan due to plaintiff, namely, Rs. 500.

He denied having made any such arrangement as to interest as in paragraph 7 of the plaint alleged, and asserted that he had agreed to pay interest at 12 per cent. per annum, as appeared on the face of the promissory note. The defendant further denied the agreement mentioned in the latter portion of the plaint as to cancelling the said promissory note on receipt of a letter from him fixing the rate of interest.

Defendant further stated that, on or about the 16th October 1870, plaintiff came to him at Moodanoor, in the Cuddapah Zillah, represented that plaintiff's parents were very angry with him for advancing the above sum at a low rate of interest, and requested defendant to write to him a letter by post proposing to pay interest on the aforesaid note, at the rate of 5 per cent. per mensem, which letter plaintiff was to show to his parents for their satis-

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faction, and at the same time promised that he would not claim interest at a higher rate than that stipulated in the said promissory note. Defendant, relying on plaintiff's promise and assurance as a friend, did accordingly post a letter, and also another at the request of the plaintiff.

The Issues settled were :—

1st.—Whether the rate of interest on the loans of 500 and 1,500 Rs., making 2,000 Rs., was agreed between the plaintiff and defendant to be 12 per cent. per annum or 60 per cent. per annum?

2nd.—Whether the defendant agreed with plaintiff to cancel the promissory note for Rs. 2,000?

3rd.—What sum is due and owing by the defendant to the plaintiff.

At the trial before Mr. Justice Holloway, the plaintiff stated that he lent the 1,500 Rs., but before he did so he got the following letter, (A.) of the 4th October 1870, from defendant.

"I will come to Madras. As soon as I come to Madras, I will pay Rs. (100) one hundred due from me individually: the remaining Rs. 300 may have been paid to you. Besides this, if you, in addition to Rs. (500) five hundred received by me on note of hand, lend Rs. 1,500, we both may then lay out 2,000 Rs. in ballast work. If you have a mind to stand in Rassi Reddi's share, and if you immediately telegraph to me "Right," I shall immediately come to Madras, settle the matter, come back and manage the business. If you do not like to do so, you need not answer.

Thus Arumugam :—

If you give me a reply, I shall immediately come on Saturday. Money is wanted—Rs. 1,500."

That on receipt of the letter he telegraphed "Right," and the defendant came down to Madras, and that some conversation took place, and that he, the plaintiff, not wishing to take a share in the contract, said he would lend the Rs. 1,500, if interest at 7 per cent. per mensem were given, and that the defendant then said if the money were paid

he would go to Cuddapah and see if he could afford giving 7 per cent. and would write and let plaintiff know, and that he would give a promissory note for the Rs. 1,500 and Rs. 500 lent before—in all Rs. 2,000, stating interest at 12 per cent., and that on hearing from him the plaintiff was to cancel the note. That he advanced the Rs. 1,500, and took a promissory note from him as follows :—

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"On demand I promise to pay to G. Ruthna Mudaliyar, or his order, the sum of Rs. (2,000) two thousand, with interest at the rate of 12 per cent. per annum for value received. Rs. 2,000. ARUMUGAM."

That the defendant left Madras for Cuddapah, and, on the 19th October 1870, wrote the following letter to plaintiff.

"Written by the servant Arumugam. Whereas with regard to Rs. 2,000 for which I came and spoke, and which I got on the 10th instant, I do not consent to pay interest at 6 per 100, but I am willing to pay at the rate of five. If you write to me immediately, telling me whether you consent thereto or not, I will lay that money on business and pay as stated above. You should write a reply at once.

Thus C. ARUMUGAM."

That on receipt of this letter, he (the plaintiff) wrote at the foot of the note—

"Cancelled this day, as a posted voucher for the same sum from the same party on different terms has been received.

G. R."

The plaintiff then stated that on the receipt of this letter he wrote a registered letter to the defendant asking him to put down the terms in a form which he sent him. This registered letter was not produced, but the defendant wrote in reply as follows :—

"The registered letter and the separate post letter written by you reached me yesterday, and I made myself acquainted with all circumstances. As there is too much flow

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of water now in the river to register and launch it, therefore after water abates in the river I shall register it and write accordingly to what you have written. Thus Coo. Arumugam."

"You consider (*i. e.* apprehend) something and write thus. Nothing of the kind would take place."

That the defendant, on the 10th November 1870, wrote the following letter to the plaintiff:—

"I kept on my own business Rs. (2,000) two thousand which I got from you. I will pay at 5 Rs. per 100. I consent to pay interest in this manner from the 13th day of October month—there is no objection to this. Don't get angry because I did not write a reply to you immediately. Excuse me. Thus your servant,

C. Arumugam.

On the 28th day of December month, I shall come to Madras.

C. Arumugam."

That he, the plaintiff, received 5 per cent. per mensem interest for two months, and further sums for interest at the same rate which he gave credit for in his plaint. He produced a witness as to the payment of two months' interest at 5 per cent. per mensem.

The defendant denied all this, said that no such agreement took place, that he wrote the letter under the circumstances referred to in his written statement, and denied paying money as interest.

Mr. Justice Holloway held, following *Abrey* v. *Crux* (L. R. 5 C. P. 37) that the oral evidence was inadmissible to show the rate of interest *dehors* that of the promissory note, and that the subsequent letters, offering a higher rate of interest, were without consideration, for there was not any evidence of forbearance, and that the plaintiff had a right to sue on the promissory note the very next day after it was made. He disbelieved the story of the defendant as to the origin of the letter, and gave judgment for Rs. 191, being the sum due after crediting some sums which under the cir-

cumstances he held should go towards principal, and a sum of money paid into Court by defendant.

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The plaintiff appealed upon the ground, among others, that the evidence adduced by him was admissible.

Johnstone for the plaintiff (appellant) submitted that the learned Judge was wrong, and that the evidence was admissible, as the conduct of the parties and the letters showed that the promissory note was not the entire contract. He referred to the following cases *Harris* v. *Rickett*, 28 L. J. Exch: 197—*Davis* v. *Jones*, 25 L. J. C. P. 91: *Wallis* v. *Littell*, 31 L. J. C. P. 100: *Morgan* v. *Griffith*, L. R. 6. Exch: 70, and *Abrey* v. *Crux*, L. R. 5 C. P. 37.

Ruthnavēlu Mudaliar for the defendant, contra.

On the 16th July 1872, the date of the argument, the learned Judges stated that, as far as the facts went, they were convinced that the evidence and letter showed that defendant agreed to pay 5 per cent. per mensem interest on the money, and that the true contract was not contained in the promissory note alone, but they wished to consider the Authorities, and on the 15th August 1872 they delivered the following judgments—

MORGAN, C. J:—There can be no doubt as to the handing over of the money by plaintiff to the defendant by way of loan and at a certain rate of interest: the only question is as to the precise rate of interest which the parties ultimately fixed upon. The plaintiff claimed 5 per cent. per mensem, and the Court awarded only 12 per cent. per annum. The view of the learned Judge was that the promissory note which bore interest at 12 per cent. per annum was *the* only contract, and that he could not look outside that, and on the authority of *Abrey* v. *Crux*(a) he ruled that the other evidence was inadmissible and decreed for the note and interest at 12 per cent. On appeal, the question of the admissibility of this evidence was argued, and we intimated our opinion at the hearing that it was admissible, and we further stated that, on the facts, our conclusion was that the ultimate and only binding agreement was that the defendant should pay interest at 5 per cent. per mensem, but we reserved our final judgment.

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1872. August 15. A. No. 14 of 1872. The real contract was that shown by the letters and the oral evidence, and I am satisfied that there was never an intention on the part of the plaintiff to advance the money unless at the higher rate of interest. The letters have a great bearing on the case.

The defendant made an attempt, which we disbelieved, to account for, and explain away, these letters which show the rate the defendant agreed to pay.

But it is said there is a written contract, the promissory note, and that no addition to, or variation from, its terms can be made by parol. With respect to this, I take the law to be that notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find upon sufficient evidence that this writing is not really the contract. And the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it.

In *Pym* v. *Campbell*, 6 E. & B. 370, Erle, J. says, "The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted "to show it was conditional: and if that had been so, it "would have been wrong. But I am of opinion that the "evidence shewed that in fact there was never any agree-"ment at all. The production of a paper purporting to be "an agreement by a party, with his signature attached, "affords a strong presumption that it is his written agree-"ment; and, if in fact he did sign the paper *Animo Con-"trahendi*, the terms contained in it are conclusive, and "cannot be varied by parol evidence: but in the present "case the defence begins one step earlier: the parties met "and expressly stated to each other that, though for con-"venience they would then sign the memorandum of the "terms, yet they were not to sign it as an agreement until "Abernethie was consulted. I grant the risk that such a "defence may be set up without ground; and I agree that "a jury should, therefore, always look on such a defence "with suspicion: but, if it be proved that in fact the paper "was signed with the express intention that it should not

"be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of "law is that evidence to vary the terms of an agreement "in writing is not admissible, but evidence to shew that "there is not an agreement at all is admissible."—And Lord Campbell says, "I agree. No addition to, or variation from, the terms of a written contract can be made "by parol: but in this case the defence was that there "never was any agreement entered into. Evidence to that "effect was admissible; and the evidence given in this case "was overwhelming. It was proved in the most satisfactory manner that before the paper was signed it was "explained to the plaintiff that the defendants did not "intend the paper to be an agreement till Abernethie had "been consulted, and found to approve of the invention; "and that the paper was signed before he was seen only "because it was not convenient for the defendants to remain. The plaintiff assented to this, and received the "writing on those terms. That being proved, there was "no agreement."

At the time of the advance of the money there was an agreement touching the transaction of loan, although the rate of interest was still unsettled and under discussion. The plaintiff declined to lend on the terms of a joint interest in the venture as proposed by the defendant, and the latter refused to pay the rate demanded. Before any final agreement, and while the transaction was still incomplete, the note was given, not as a writing which expressed or was meant to express the final contract, but rather as a voucher, or a temporary and provisional security for the money, pending the discussion respecting the rate of interest. And if the note was thus given and received, it should not be regarded as the contract between the parties, or as a written contract excluding other evidence of the true contract.

Kernan, J:—I agree with the Chief Justice in the result arrived at, though I am not prepared to say that the promissory note did not at any time represent some contract between the parties. The view I take is this. Assuming that the promissory note did repre-

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sent a complete contract between the parties, such contract was waived and discharged by the acts and agreement of the parties before breach, and a new contract, namely, the contract for larger interest, substituted. In *Goss* v. *Lord Nugent*, 5 B. & Ad. 58, Lord Denman, after referring to the rule excluding parol evidence of what passed between the parties before or contemporaneous with a written contract says, " but after the agreement has been reduced " into writing, it is competent to the parties, at any time " before breach of it, by a new contract not in writing, " either altogether to waive, dissolve, or annul the former " agreement—and thus to make a new contract." In *Stead* v. *Dawber*, 10 A. & E. 57, Lord Denman, referring to an agreement to alter the days of delivery in a prior written agreement says (*a*) " Nor does any difficulty arise from the " want of consideration for the plaintiff's agreement to " consent to the change of days ; for the same consideration " which existed for the old agreement is imported into the " new agreement which is substituted for it."

Foster v. *Dawber* 6 Exch. Rep. 839, shows that the contract on a note may be waived and discharged by parol before breach and without any new consideration. The evidence, both documentary and oral, of what took place after the promissory note was delivered to plaintiff, can leave no doubt that the contract on the promissory note, if there was a contract, was, as a matter of fact, discharged and waived by the parties.

The above view of the facts and law is sufficient to dispose of this appeal.

But I have no doubt, as a matter of fact, on the whole of the evidence, that the promissory note was not and never was intended to represent the entire contract, and that the plaintiff lent his money on an agreement for a higher rate of interest than 12 per cent.

As to the admissibility of the parol evidence prior to, and contemporaneous with, the making and delivery of the note, the case of *Harris* v. *Rickett* was referred to by Mr. Johnstone, and I think that, with reference to the remarks

(*a*) p. 66.

of Pollock, C. B. and Bramwell, B., the evidence was admissible. Pollock, C. B. says, "We are of opinion that the rule should be discharged, on the ground that the writing does not contain and was not intended to contain the entire obligation of the bankrupt. They have not found, nor does it appear to us, that the writing was intended to contain the whole agreement, and we are, therefore, of opinion that the rule relied upon by the plaintiffs only applies where the parties to an agreement reduce it to writing and *agree or intend to agree that that writing* shall be their agreement;" and Bramwell, B. says, "The principle of the rule is that it must be assumed that the parties agreed that the written agreement should be the evidence of the contract. The difficulty is that in this case there was evidence that the parties did not agree that the written agreement should be the evidence of the contract."

1872. *August* 15.
A. No. 14 *of* 1872.

In the case of *Abrey* v. *Crux* (a), the defendant endeavoured to set up an agreement that the plaintiff should pay himself the amount of the bill drawn by the defendant by selling some securities, and until he, the plaintiff, did so, the defendant was not to be sued on the bill, and it was there rightly held that the oral evidence of this was inadmissible. In that case the defendant admitted *the* contract contained in the bill, but set up something inconsistent with the mode of payment expressed on the bill. Here the plaintiff's case is, the promissory note was not *the* contract.

It is to be observed that this action is not on the note, but on the consideration of it, viz., money lent.

Decree of the Lower Court reversed, and decree for plaintiff for Rs. 1,390-3-2, with costs of original hearing and appeal, with interest on debt and costs at 6 per cent. till payment.

(a) L. R. 5 C. P. 37.

Appellate Jurisdiction. (a)

Regular Appeal No. 129 *of* 1872.

NA'MASIVA'YA GAUNDAN.........*Appellant.*

KYLASA GAUNDAN..............*Respondent.*

Plaintiff sued to recover from defendants, his brothers, rupees 25,000, with interest, on a deed of assignment "B" granted to him by one Rájah Gaundan, dated 30th October 1870, transferring to plaintiff a promissory note "A" for rupees 25,000, executed by 1st and 2nd defendants to the aforesaid Rájah Gaundan, as one of the mediators, in conjunction with one Subbráya Gaundan, in a division of family property between plaintiff and defendants and others, agreeing to pay over on demand by the 30th September 1870 to plaintiff, through the mediators aforesaid, 25,000 rupees in lieu and on account of family property in possession of defendants.

The defendants admitted the execution by them of the document for 25,000 rupees, to be paid by them to plaintiff, (A.) and pleaded that it was given on consideration of the withdrawal of a criminal prosecution or, if not, that there was no consideration at all; and that, at the time of its execution by them, there was no dispute or question between them and plaintiff as to a partition of family property, which had been definitely settled by the Civil Court at Salem in Original Suit No. 2 of 1868, under the decree in which the defendants had recovered rupees 13,000 and odd from the plaintiff.

They denied any division of family property by mediation, as also that they agreed to pay 25,000 rupees on account of family property in their possession, also the validity of A and that it was legally binding upon them.

The Court of First Instance found—(1) That a partition of family property was effected by mediation and the document A was executed to the mediators by defendants on account of family property in defendants' possession. (2) That A was valid in law and binding on defendants,—and gave judgment for plaintiff for the amount sued for.

Upon appeal by the first defendant—*Held*, by the High Court, that as the decree in Original Suit No. 2 of 1868 (finally disposed of in appeal by the High Court) settled all the rights of the parties and, among other matters, the question of this alleged concealment, or theft, which the Court found the present plaintiff to have falsely asserted—there was here, therefore, no "res dubia" or "lis incerta," nor could either party believe that there was such. The final judgment of a competent Court in a suit to which the plaintiff was a party, had determined the matter.

That, on the facts of the case, it seemed impossible to doubt that the note was executed as a consideration for getting rid of the criminal proceedings, and that, as such a consideration is not only null but vicious, the decree of the Civil Judge should be reversed.

1873. *March* 3. *R. A. No.* 129 *of* 1872.

THIS was a Regular Appeal against the decision of E. F. Eliott, the Civil Judge of Salem, in Original Suit No. 4 of 1872.

The plaint was as follows:—"This is a suit for Rupees 25,000 under a document made over.

(a) Present:—Morgan, C. J. and Holloway, J.

My father Athiyanna Gaundan had four sons, my deceased elder brother Rangasámi Gaundan, myself, Námasiváya Gaundan, and Pongaly Gaundan. In consequence of a long disagreement between us in respect of division in the family, we were contending before the Magisterial, Civil, &c., tribunals. Thereupon, Subbaráya Govindar, the Zamindár of the muttah of Komaramangalam, &c., and Rájah Govindan, the Zamindár of the muttah of Puttúr, &c., interceded as mediators to effect a compromise between us, divided our muttah and other real and personal properties, and made a settlement that the 1st and 2nd defendants should pay me through Subbaráya Govindar and Rájah Govindar among the said mediators, a sum of Rupees 25,000 in cash for the ready money, gold and silver jewels, &c., which were in the 1st and 2nd defendants' possession, and the 1st and 2nd defendants have executed a promissory note on stamp paper to Rájah Govindar, among the said (mediators), on the 21st September 1870, promising to pay Rupees 25,000 on demand.

By order of Subbaráya Govindar, Rájah Govindar has made over to me his right under a stamped and registered bond executed to me by him on 31st October 1870, saying that the said 1st and 2nd defendants did not pay the amount according to that (promissory note), and that I might recover and take the same.

The said 1st and 2nd defendants did not pay according to that bond, though they were often asked.

I therefore pray that the defendants may be adjudged to pay me the principal, Rupees 25,000, according to the said document, together with subsequent interest."

Defendants filed the following written statement:—
"Not a cash of the amount of the document A in question was received (*by us*); and this fact is clear from the documents A and B and the plaint.

With a view to bring shame upon us and usurp our property, the plaintiff filed a Magisterial complaint against us as if we had committed fraud in respect of family property; and during the time the Sub-Magistrate of Trichen-

1873. March 3. R. A. No. 129 of 1872.

gode was enquiring into the said complaint, the plaintiff urged that if we gave him a document for 25,000 Rupees and the largest muttah in the family estate, he would cause the dismissal of the complaint without attempting to get the same proved; and, accordingly, the plaintiff having greatly threatened and forced the 1st defendant, who was in custody of the Police, and also the 2nd defendant, who was let on bail to address a petition to the Revenue Officer, (*we*) were compelled to yield to the force used by the plaintiff for fear (*we*) should be disgraced; and the plaintiff then caused the document A to be executed, ostensibly in the name of Rájah Gaundan, and obtained it forcibly as stated above. But it was not executed of our free-will and in our ordinary and unperturbed state of mind.

Soon after the execution of the document A and the drawing up of the petition aforesaid, both parties appeared before the Magistrate, and the said case brought against us was then dismissed.

At the time of the execution of the document A there was no dispute whatever between both parties in respect of division. But, so far back as two years prior thereto, the question of division was fully settled through the Civil Court, and Rupees 15,000 and odd were paid to us by plaintiff, according to the decree passed in Original Suit No. 2 of 1868. Hence there having been no dispute whatever regarding division at the time of the execution of A, and no ready cash having been received (*by us*) under the said document, the allegation in the plaint that our real and personal property was divided by arbitrators, and that we had agreed to pay plaintiff, through arbitrators, Rupees 25,000 in cash for the ready money, jewels, gold, silver, &c., said by plaintiff to be in our possession, is false and fraudulent.

The document A having been obtained *(from us)* under duress, while (*we*) were in custody on a criminal charge falsely brought against us through enmity, is opposed to law and justice; and it is, therefore, not valid, nor are we liable to pay anything for it.

We pray, therefore, that the plaintiff's suit may be dismissed with costs."

The following Issues were framed :—

I. Whether a partition of family property was effected by mediation, and whether the document A was executed to the mediators by defendants on account of cash and gold, silver ornaments, &c., belonging to the family property in their possession.

II. Whether the document A is valid in law and binding upon the defendants 1 and 2.

The following is taken from the judgment of the Civil Judge :—

"A, is a promissory note executed by defendants to one Rájah Gaundan for the payment of Rupees 25,000, value received by them, and dated 21st September 1870. B, is the deed of assignment thereof by Rájah Gaundan to plaintiff.

The evidence of these witnesses, Subbaráya Gaundan (1st witness) and Rájah Gaundan (2nd witness), shows that on the 21st September 1870, A was written out by the 1st defendant in his own handwriting, and executed by both defendants of their own free-will and consent in a mediation expressly called for by them regarding a partition of family property between them and plaintiff, in respect to which there had been endless strife and disputes between them, and which came off at about 4 or 5 P. M., on that day, in the house temporarily occupied by these witnesses at Trichengode, to Rájah Gaundan, one of the mediators, and 2nd witness, by order of Subbaráya Gaundan, another and chief mediator and 1st witness, whom the plaintiff at the time distrusting the defendants asked to be security for the payment to him of the 25,000 Rupees then agreed to by defendants on account of the cash and jewels, &c, and other moveable family property in their possession, and which sum was fixed by the mediators on a rough calculation to be the value of the plaintiff's share in the said moveable property and represented the same. They affirm that no consideration in cash was actually paid by Rájah Gaundan *then* on A to defendants, nor received by them, as stated therein, because of this special arrangement at the time, by

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which this was understood to be a mere paper accommodation and name-lending of Rájah Gaundan as a security to plaintiff for repayment to him of consideration belonging to him, but actually enjoyed by defendants, to the amount of A, and to save an actual transfer of goods. In short, it is shown to be a transaction on paper, of a promise to pay in cash instead of in kind, for consideration received in the matter of goods duly received by defendants, and parted with by plaintiff, upon this mediation, to the value stated in A, and executed to a mediator as security for the same, who, upon its non-fulfilment by defendants on demand by him, has assigned the promissory note to plaintiff to recover upon under the deed "B." In further proof and corroboration of the fact that a partition of family property was effected then by mediation, the plaintiff has filed the document "C," an authenticated copy of a petition for transfer of registry of certain villages which had been settled on the same day and at the same time between the parties by drawing of lots, and presented to the Tahsildar of Trichengode on that date, the 21st September 1870, in person, by the parties, as deposed to by him as 3rd witness for plaintiff, and which is admitted by the defendants. With all these documents admitted by defendants, and if such be the truth and *bonâ fides* of this transaction under A, which there seems little reason to doubt, judging from the respectability of the witnesses who depose to it and their relationship to the parties in this suit, as well as by the fact that they profess to be wholly disinterested personally therein and are the witnesses cited on both sides, there appears nothing objectionable or illegal in such an arrangement in itself by the consent of all parties, and A would, therefore, be necessarily valid and binding upon the defendants in ordinary circumstances, except it is otherwise invalidated by any of the pleas of duress, &c., pleaded by defendants in justification and acquittance, which has now to be considered.

The defendants urge that A is not valid and is not legally binding upon them, because (1) they have never received the consideration of it; (2) that it was executed under duress during the pendency of a criminal charge

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preferred against them before the Sub-Magistrate of Trichengode, and to save the further disgrace of their committal for trial to the Sessions Court; (3) that at the time of its execution there was no question of a division of property to be mediated upon, that having been definitely settled by the decree of the Civil Court of Salem in Original Suit No. 2 of 1868, upon which they had recovered from plaintiff.

The first of these objections has already been disposed of in the definition of the nature of the transaction under A, as explained by common witnesses and mediators, which the Court has accepted as the truth, and which establishes the fact that consideration has been received by defendants upon it, if not actually in hard cash, at all events its equivalent in reality, in kind.

On the second point, of duress, the defendants have examined the 1st defendant himself on their side, who, as naturally might be expected, supports it, even at the expense of truth, which he has greatly overstepped, and has had no hesitation whatever in grossly perjuring himself. He can get no one whomsoever to support him in his statements, and his evidence stands singly by itself, and is further flatly contradicted in its facts by all alike who have been examined in this case, the common witnesses, the Tahsildár, and his own vakil who conducted his defence in the criminal charge before the Sub-Magistrate; and it is in point of credence utterly worthless, as it is impossible to believe it at all, and it is besides, at its best, the evidence of a most interested party to this suit. The Court, therefore, rejects the testimony as totally incredible and untrustworthy, and excepting it, there is no evidence as to duress at all. It is perfectly true that this criminal charge against defendants was disposed of on this day, but, as the Tahsildár and vakil both say it was closed between 2 and 3 P. M., it must have been before the execution of A, which was after 4 or 5 P. M., even according to the statement of the 1st defendant himself, and so A could not possibly have been executed during the pendency of this criminal trial, if even it had any connection with it.

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According to 1st defendant, this criminal charge was dismissed upon the execution of A, which was read out first aloud to the Sub-Magistrate, along with C, in the Kacharí, and then they were discharged. This is most positively and solemnly denied by both Tahsildár and defendant's vakil, who profess, neither of them, to know anything about A at all.

The defendant's vakil, on the other hand, now pleads that although A was executed after the criminal trial, yet the preliminary arrangements connected with it were all got up during the pendency of the trial, or on the last day of it, and while the 1st defendant was in legal custody at the Kacharí, and therefore A was connected with the trial and was given under duress.

This, in itself, is manifestly a contrary pleading to that of defendant himself, who says the case was dismissed upon A itself, and not in connection with it. The Court, however, holds most certainly that the trial was not dismissed upon A as stated by defendant, and that it is not in the least probable that it was dismissed in connection with A either, but on its merits alone. It appears, moreover, to have been called up for trial by the Sessions Judge subsequently, believing a *primâ facie* case to exist, and to have been ultimately dismissed by him. Further, the defendant's vakil most positively affirms that he did his very best to dissuade the defendant against signing any document of the kind of A, and advised him most strongly not to do so, assuring him that the case against him was certain to be dismissed, but that the defendant seemed to have made up his mind differently, and to have suspected his intentions in saying so. Considering all this, the Court entirely fails to see where the duress complained of existed at all, and dismisses that objection accordingly.

The only remaining objection is easily disposed of by the fact that it is well known that for a very long time past, both before and since the decree in Original Suit No. 2 of 1868 referred to by defendants, these brothers have been fighting unmitigatingly regarding their shares in the

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family property, and that charges and counter-charges against one another with reference thereto have been the rule rather than the exception, and, therefore, it is to be inferred that that suit did not contain the whole facts of their disputed property, or definitely settle all matters between them with regard thereto, and there is ample room for supposing that this bickering and strife was all entirely owing to fraud and concealment of property of some kind by one or other, which, besides being difficult to bring to light, could never be brought conclusively home to any one party in particular criminally, and which from disgust eventually led them mutually to seek some reconciliation of this kind. It is the natural inference to be drawn in the circumstances, and the Court is prone to do so.

Looking at the period of two years that have elapsed since the execution of A by defendants, without any steps being taken by them with regard to it by criminal complaint or otherwise in disputing it, either on the score of duress, or for any other reason whatever, nor until this suit had been first filed against them by plaintiff for the amount thereof, when for the first time they file such pleas in answer, their only explanation of their laches being that they believed A to be valueless for want of consideration paid thereon, the Court considers that thereby a suspicion attaches to their case, as unfavorable to their pleadings, as it is advantageous to the truth of plaintiff's cause, and which by rendering those pleas worthless in themselves is most fatal to their rebuttal of plaintiff's claim. For these reasons the Court finds in the affirmative on both issues, viz. :—

I. A partition of family property was effected by mediation, and the document A was executed to the mediators by defendants on account of cash and gold and silver ornaments belonging to the family property in their possession.

II. The document A is valid in law and binding upon the defendants 1 and 2 ; and adjudges for the plaintiff as sued for in the sum of Rupees

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25,000, together with interest and subsequent interest and all costs."

The 1st defendant appealed upon the following grounds.

1. The decree is against the weight of evidence.

2. There is no consideration whatever for the promissory notes sued on.

3. The facts of the case shew that it was extorted from the defendant through threats, fear and undue influence.

4. The Civil Judge was wrong in awarding past interest when it was not even prayed for by the plaintiff.

Sanjiva Rau for the appellant, the first defendant.

Scharlieb for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—The defence is that the promissory note was given on consideration of the withdrawal of a criminal prosecution, or, if not, that there was no consideration at all.

The proceedings are undoubtedly open to very great suspicion. The Sub-Magistrate had ordered the defendant into custody, refusing to allow him to be longer at large upon bail. After so proceeding upon the evidence before him, he dismissed the complaint on the ground that there was no evidence justifying a committal. These proceedings appeared so suspicious, that a committal was ordered and an acquittal followed.

On the very day of the discharge in these very suspicious circumstances, there occurred what is called an arbitration, and this note was executed as part of the matter of the compromise. If the case depended upon this alone, strong as might be our suspicions, we should, perhaps, not be able to say, in opposition to the conclusion of the Civil Judge, that the pressure of the prosecution was the defendant's motive, and its withdrawal the consideration for the execution of this note. The matter alleged to have been compromised is important both as matter of law and as throwing light upon this evidence.

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After a suit finally disposed of by the High Court, in which the substantial question in dispute was whether the money and jewels were in possession of the present plaintiff, or had been wrongfully taken out of his hands by the defendants, the Court came to a conclusion which it has never been sought to impeach, that the plaintiff was in fact in possession, and the decree for division settled all the rights of the parties, and, so far as the Civil Courts were concerned, set them at rest for ever. Among other matters was the question of this alleged concealment, or theft, which the Court found the present plaintiff to have falsely asserted.

There was here, therefore, no "res dubia" or "lis incerta." Moreover, neither party could believe that there was such (*Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449 : *Cook* v. *Wright*, 1 B. & S. 559). These later cases bring the English law much nearer to sound principle than the earlier. The principle of these was that there must be between the parties a question really doubtful in point of law (*Longridge* v. *Dorville*, 5 B. & A. 117.)

It is, however, as clear law in England that the foregoing of a claim which the claimant knows to be unfounded is no consideration for a promise (*Wade* v. *Simeon*, 2 C. B. 548). In this case the final judgment of a competent Court in a suit to which the plaintiff was a party had determined the matter. The rule of the Roman law is distinct. "Si post rem iudicatam quis et solverit repetere "poterit idcirco quia placuit transactionem nullius mo- "menti esse."

The exceptions to the rule (12. 6. 23. s. 1) have no application to this case. This final judgment, independently however of its bearing in point of law, reflects upon the weight of the evidence. It is impossible to believe that the defendant, who had for several years successfully contended that the property was in plaintiff's possession, without external pressure and moved merely by conscientious scruples, agreed to re-open, to his disadvantage, this concluded controversy.

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It is impossible not to see that the pressure of the criminal prosecution was the real ground, and difficult to doubt that the acts of the arbitrators, the complainant and the Sub-Magistrate, conjointly conduced and were intended to conduce to the admission of a liability which a conclusive decision of a competent Court had decided not to attach to the defendant. On the facts of the case, therefore, it seems impossible to doubt that the note was executed as a consideration for getting rid of these criminal proceedings, and as such a consideration is not only null but vicious, the decree of the Civil Judge must be reversed and the original suit dismissed. There will, however, be no costs throughout.

Appellate Jurisdiction. (a)

Regular Appeal No. 40 *of* 1871.

RA'JAH RA'JAH VARMA VALIA RA'JAH OF CHERAKAL KOVILAGOM...... .... *Appellant.*

KOTTAYATH KIYAKI KOVILAGATH REVI VARMA MOOTHA RA'JAH AND 2 OTHERS... *Respondents.*

Plaintiff (the Cherakal Rájah) sued to establish his right to the custody, management and appropriation for the purposes of a pagoda, of certain jewels &c. used in the religious ceremonies performed in the pagoda, which jewels he alleged had been assigned to him by the Uralleis of the pagoda. The Civil Judge dismissed the suit.

Upon Regular Appeal by the plaintiff

Held by KINDERSLEY, J. That the trustees of a pagoda cannot lawfully alienate the trust property subject to all the trusts attaching to it.

By HOLLOWAY, J. That while seeing no reason to doubt that a religious office cannot be made the object of sale, the present case is a much more simple one—Here the plaint is for certain jewels, which are materials used in religious worship, to the custody of which the alleged vendor is entitled and to the careful custody of which he is bound That these articles are by all systems of law, and by the Hindu law almost more emphatically than by any other, absolutely "extra commercium."

1873. February 20. R. A. No. 40 of 1871.

THIS was a Regular Appeal against the decision of J. W. Reid, the Acting Civil Judge of Tellicherry, in Original Suit No. 3 of 1869.

In this case the plaintiff (the Cherakal Rájah) sued to establish his right to the custody, management, and appro-

(a) Present :—Holloway and Kindersley, J J.

1878. February 20. R. A. No. 40 of 1871.

priation for the purposes of the Trachurmana pagoda, of certain jewels, &c., used in the religious ceremonies performed in the pagoda, which jewels, he alleged had been assigned to him by deed of 10th May 1868 by tho urallers of the pagoda. Defendants, the holders of Muppu Stanom and Elama Stanom, denied the right of the urallers who executed the deed sued upon to assign the property in question.

The judgment of the Civil Judge contained the following :—

" The points to be determined in this case are :—Has the plaintiff acquired by purchase the rights of the urallers,—and (2nd) Do those rights, validly acquired, give him the power, which he wishes to enforce, of possession, uncontrolled by the defendants, of the Bhanarom property, and the power to remove the Bhanarom from its present place of custody? The document under which the Cherakal Rájah claims the rights now sought to be enforced is E. It is signed by the 4 urallers, and they admit their signatures, and that they got it registered. It is dated 29th Medom 1043, (10th May 1868.) On the 13th Edavom (24th May) of the same year, the Rájah executed F to them (urallers).

E is a *Tir* or transfer deed. In it is *recited* that the Tracharamana pagoda, the Kottiyur pagoda included in it, the Kundem pagoda, the Karimpanakal gopuram, and 6 other chetrums are the property of the four tárwáds ; that certain lands, the property of the pagoda, had been sold for the debts contracted in the conduct of ceremonies by auction ; others sold by private contract, and others mentioned in list A were passed on kánom ; that over and above there is a debt of Rupees 46,000, personal debts, and others secured by hypothecation for the payment of which the urallers are pressed ; that the present income of the pagoda is insufficient to carry on the ceremonies ; that if the affairs of the chetrum remain in their hands, the debts are liable to increase ; that the Rájah was willing to perform the ceremonies with the income, and defray the deficiency out of his own pocket ; and it is *declared* that the urallers having received from the Rájah to pay off those debts Rupees 46,000 and for themselves, Rupees 10,000, *relinquished*

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to the Rajah Tracharamana chetrum valued at Rupees 100,000, and chetrums mentioned above included in it and the land mentioned in list A as the properties of the temple situated in the French territory and in 23 British Amshoms lands and parambas, forest, hill, tank, &c., an elephant worth Rupees 2,000 pledged for Rupees 1,550—the Bhanarom including silver, gold, pewter, &c. belonging to Tracharamana temple, and used for the temple, worth Rupees 48,000, described in schedule B, which is secured in Karimpanakal gopuram ; and after *reserving* the duty performed by them in conjunction with the "Adiyandara yogan" and the pecuniary rights connected therewith particularized below as Rupees 750, relinquishing to the Rájah all their rights over the properties not passed on kánom and those to be redeemed the right to take the offerings, pay the revenue, to manage all ceremonies, to enjoy and exercise all authority : reciting also the delivery of deed box and deeds, and *stipulating* that the urallers were to pay all the debts, personal and on hypothecation, existing against the temple with the sum aforesaid to have been given by the Rájah, and that in default their private property and themselves were to be responsible, not the Rájah and the dévaswom properties.

[The Civil Judge then commented on the evidence given in the case and proceeded.]

I next come to the point whether the urallers may sell their rights. The defendant has produced against this a decree of Mr. Holloway in *Appeal Suit* 118 *of* 1861 in which the Cherakal Rájah was plaintiff, and in which he sought to enforce the transfer to him of an uraima right. Mr. Holloway's opinion was expressed in the following words. "The plaintiff has acquired no rights whatever under the deed of the trustees (urallers) their duties are not to the plaintiff (in that one having a melkoima right) but to the followers of the Hindu religion entitled to the services of the pagoda. The whole public so entitled are the *cestui que* trusts ; the duties to be performed are the protection of the property devoted by the piety of former ages to the services of religion against all invasions. The property itself is by the principles of all law that of no in-

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dividual whatever. A trustee cannot by any act of his own denude himself of his character of trustee until he has performed his trust (*Sir T. Plumer* in *Chalmer* v. *Bradley* : 1 J. & W. at p. 68). It is manifest that where the trust is one of perpetual obligation, where the *cestui que* trust are the whole Hindu community, where the property is extra commercium, in no sense the subject either of bargain or sale * * * the attempt of trustees to surrender the trust property and thus throw off their character would be a gross breach of trust, but would be quite powerless to vest any rights in the person in whose favor they had committed such breach of trust. On all the points I am satisfied that plaintiff has appeared in Court without a shadow of title." (*Appeal Suit No.* 118 *of* 1861.)

Now this decision of Mr. Holloway is of much weight in the settlement of this point of law, which, doubtless, is one of immense importance to the followers of the Hindu religion in Malabar. The counsel for the plaintiff, however, argued per contra that the decision rested on English law; that the English trustee, and the Malabar urallen are very different; that the trustee is personally trusted; that the reason the English trustee cannot get rid of his trusteeship is because the confidence of the precator in the trustee is the result of knowledge; that in England there are no such hereditary trusteeships as the uraima of Malabar, and that the question of personal confidence does not enter into the question. He, however, refers to other rulings. One being *Regular Appeal No.* 64 *of* 1861, being an appeal from Mr. Cook, Civil Judge of Calicut. The part relied on is.—"It is disputed that the property being attached to a pagoda is inalienable. The pagoda, however, is itself the property of the family in question, and by the custom of Malabar the lands are alienable as any other lands." This decision is a little aside the question, as it is not a question in this case of alienating a certain piece of land as the property of the pagoda, but alienating the trusteeship. For purposes of the tárwád, a karnavan may sell the lands of the tárwád, but he could not alienate the karnavastánom, and so a piece of land belonging to a dévaswom may be sold in its interests,

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but that does not affect the question whether the trusteeship or uraima may be sold. Another case quoted was Special appeal, from the Principal Sadr Amin of Tellicherry, No. 574 of 1860 (p. 30 of last Volume of *Special Appeal Reports.*) It, as the other case, concerns a piece of land attached to a pagoda, not the uraima itself.

The third case cited by Mr. Mayne was a Judgment of Justices Innes and Collett in *Special Appeal* No. 390 *of* 1868 from the Civil Court of Tranquebar, that there was nothing in Regulation VII of 1817, nor in any other provision of the law to prevent the manager of a teruvassel, or charitable endowment, from selling either the land attached to and burdened with the trust, or the management of it.

It certainly is, apparently, a strong case in plaintiff's favor, but there is a difference, I think, between the case of a charity which feeds the destitute and ministers to the supply of merits, as he would think, to the founder, and of lands given in the immemorial past to maintain a temple resorted to by the Hindus of all Malabar. In the latter case, to repeat the words of Mr. Holloway—" the whole public (or followers of the Hindu religion entitled to the services of the pagoda) are the *cestui que* trusts," and to make such a matter of bargain and sale would be to let in confusion, and leave the Hindu religionists in utter uncertainty to whom they should look. The uraima might pass from hand to hand like a bank note, and to whom then could the worshippers appeal ? After mature deliberation, I am quite of opinion that Mr. Holloway's Judgment is one founded on equity. The trust was one imposed on the urallers by the original endowers of the lands, and those urallers cannot treat the trust as they wish. They must discharge it, and if they wish to be rid of it they cannot. It may be said—in that case they have no remedy: what are they to do ? This is a point for the Legislature to decide, and which it has not done. Act XX of 1863 only provides for Committees in cases where formerly the Board of Revenue had the nomination of trustees. In making the above remarks it will be seen that I utterly disbelieve the

assertions of the interested witnesses as to their powers as urallers and their alleged freedom from responsibility to any one but their tárwád.

The real owners are the Hindu worshippers. Uraima is a trust in its strictest sense."

He dismissed the suit with costs.

The plaintiff appealed upon the following grounds, among others :—

The Civil Judge was wrong in holding that the sale by the urallers was invalid.

He was wrong in law and upon the evidence in holding that the urallers could not remove the Banarom.

Mayne (Acting Advocate General) for the appellant.— The Civil Judge is wrong in deciding that urallers cannot sell their uraima right. I hope to be able to show that uraima rights are as saleable as any other rights. [He then read the Judgment of Mr. Holloway, referred to by the Civil Judge.] That is so, no doubt, in English law. Mr. Lewin (*on Trusts*) at page 205, says, "The office of Trustee, being one of personal confidence, cannot be delegated."—But the moment you allow the idea of a hereditary trusteeship, you can no longer speak of personal confidence; for the next hereditary trustee may be an infant, and in that case the trust would have to be executed by his guardian, or he may be utterly unfit by reason of his character, &c., for the office.

He cited the following Authorities in support of his proposition.

Decisions of 1862, p. 30.

" " p. 90. [HOLLOWAY, J.—In this case it was found a private trust, not a public one.]

1 M. H. C. R. 262.

4 Mad. Rev. Register, 109.

1873. February 20. R. A. No. 40 of 1871.

Privy Council Record, p. 13.

Sloan (with him *Sanjiva Rau*) for the respondents.—The case reported at p. 109, 4 Mad. Rev. Register, had reference to a private pagoda and not to public property. I submit that the Court, in that case, took a wrong view of Regulation VII of 1817.

[HOLLOWAY, J.—As far as I understand this case it decides that the corpus of the charity can be alienated subject to the trust, and that there is nothing in the Regulation against it.]

In 1 Morley's Dig. 550, it is laid down that "Lands duly endowed for religious purposes are not subject to private alienation."

[HOLLOWAY, J.—Mr. Mayne distinguishes this case, and what he says is, "You cannot sell altogether, but you can sell subject to the duties of the trust."]

Morley's Dig. N. S. p. 351.

Strange's Hindu Law, Vol. 1, p. 151.

Mayne, in reply.—Mr. Sloan has not encountered the only position I put forward. I do not say the urallers might have sold this property for their own benefit or for the benefit of the Cherakal Rájah, or that they could have encumbered it. I say the property can be transferred subject to the trusts and cannot be transferred without them. Whenever you come to the idea of a hereditary trust, you must dismiss every principle of law which depends on personal trust, confidence, or selection. The cases cited on the other side go only to the point that property cannot be alienated so as to destroy the trust. The case in M. H. C. R., Volume 1, was decided by Judges who had large Malabar experience.

[HOLLOWAY, J.—The ratio decidendi of that case is that when four people are jointly interested, they must all join to dispose of the property.]

1873. February 20. R. A. No. 40 of 1871.

The case in the Revenue Register is strongly in my favor. Mr. Sloan says that it turns only on Regulation VII of 1817, but that Regulation imposes no new duty.

Before finally disposing of the case, the High Court remitted it to the Civil Court in order that the parties might have an opportunity "of placing on record all the information that can be collected as to the nature of the foundation, its object, the duties to be discharged, and all matters connected with its mode of foundation which can be ascertained."

The Civil Judge found "that the foundation was established by a portion of the Hindu Community, for the purpose of keeping up the yearly ceremony, and that the duties to be discharged are those connected with the performance of that ceremony."

The Court delivered the following judgments :—

KINDERSLEY, J.—The question appears to be, whether the urallers of the pagoda in question can lawfully convey to the plaintiff the pagoda and all the property thereto belonging upon the same trusts and subject to the same duties as devolved upon themselves. The conveyance in the present case was made in consideration that the plaintiff should pay debts due by the pagoda. And the plaintiff seems to have been a wealthy person, probably in a better position to set the affairs of the pagoda in order than the urallers themselves. The conveyance to the plaintiff may, therefore, possibly have been advantageous to the pagoda, and the office of urallen having been hereditary, no question of personal fitness arises. The question, therefore, is reduced to this; can the trustees of a pagoda lawfully alienate the trust property subject to all the trusts attaching to it. I am of opinion that we ought to determine this question in the negative. There seems to be no judicial decision directly on the point, and I have not been able to find any Hindu Authorities to help us. But I believe that the traditions and feelings of the peo-

1873. February 20. R. A. No. 40 of 1871.

ple of this country are quite opposed to such alienations. I am, of course, aware that such alienations have now and then taken place. But the rule remains unaltered, however often it may have been broken; and it would not be safe to gather the ancient law of religious institutions from the practice in an age characterized by the decay of such institutions, and by a general relaxation of moral and religious obligations. It is probable that the rule of the old Hindu law was not less strict against the alienation of religious trusts than that of the ancient Romans. In many cases there are so many persons interested, as holders of different offices connected with the pagoda, that it is hardly possible to imagine that the property could be alienated without the consent of all. And where the office of urallen is hereditary in particular families, it is difficult to conceive that the founder intended to confer a power of alienation. The actual infrequency of the alienation of religious trusts is a strong argument that the lawfulness of such alienations has always been doubted; for it may be assumed that if we were to decide in favor of such alienations, they would become much more common. That a trustee should be able at pleasure, by the sale of a religious office, to divest himself of a duty which he owes to the public, is, of course, opposed to our western notions of law. And, although such alienations might in some cases tend to the benefit of the religious endowment, it is obvious that we could not sanction the alienation of a religious trust without opening a very wide door to fraud. On the other hand, if we decide that the trustees of a pagoda cannot lawfully alienate their trust, I believe that our decision will be in accordance with the law, as generally understood by the people of this country, and by the people of all civilized countries. I would, therefore, confirm the decree of the Civil Court, and dismiss the appeal.

HOLLOWAY, J.—While I see no reason to doubt that a religious office cannot be made the object of

sale, the case before us is a much more simple one, and much of the argument before us is altogether beside the question. 1873. *February* 20. *R. A. No.* 40 *of* 1871.

Here the plaint is for certain jewels, which are materials used in religious worship, to the custody of which the alleged vendor is entitled and to the careful custody of which he is bound. That these articles are by all systems of law, and by the Hindu law almost more emphatically than by any other, absolutely "extra commercium," there exists no doubt, and on this simple ground I would affirm the decree of the Civil Judge and dismiss the appeal with costs.

Appeal dismissed.

Appellate Jurisdiction. (a)

Special Appeal No. 310 *of* 1872.

VENKAPPA CHETTI and another.......*Special Appellants.*

AKKU.......................................*Special Respondent.*

Plaintiff sued for cancellation of the sale of certain lands, made to defendants in 1841. In 1843 defendants executed an agreement (A) to plaintiff, giving her a right of re-purchase. The language of the document was—" If you and your posterity pay in a lump the 175 Rupees, we will hand over the lands to you". Upon the question of limitation—*Held*, in Special Appeal, that the plaintiff's claim was barred, more than 12 years from the date of the cause of action (1843 at latest) having elapsed before suit.

THIS was a Special Appeal against the decision of R. Vasudéva Rau, the Additional Principal Sadr Amín of Mangalore, in Regular Appeal No. 569 of 1870, reversing the decree of the Court of the District Munsif of Mangalore in Original Suit No. 427 of 1867. 1873. *March* 7. *S. A. No.* 310 *of* 1872.

Plaintiff sued for the cancellation of a sale deed executed by herself and her brother to the ancestors of the defendants on the 18th June 1841, on the ground that she was entitled to re-purchase at any time, under the conditional agreement A, dated 14th February 1843.

(a.) Present:—Innes and Kernan, J.J.

1873. March 7. S. A. No. 310 of 1872.

Plaintiff alleged that she sold the disputed land to the defendants' ancestor for rupees 700, under Exhibit I, and obtained from him the agreement A; that she, accordingly, tendered the sale amount before the Mangalore Munsif in 1867, which the defendants refused to accept, and that she has been enjoying the land as a tenant of the defendants. Hence the present suit for the cancellation and delivery of the sale deed, the land involved therein being assessed at rupees 27-13-7. The suit was valued at rupees 287-12-8.

The 1st, 3rd and 4th defendants denied the genuineness of Exhibit A, the conditional agreement.

The 2nd defendant was *ex-parte*.

The District Munsif dismissed the plaintiff's claim.

The plaintiff appealed.

The Principal Sadr Amin delivered the following judgment:—

"The point for decision in this case is, whether Exhibit A is genuine.

I think it is, and so differ from the Munsif, who admits that the execution of the deed is proved by the 1st, 2nd, 3rd and 4th witnesses for the plaintiff, but who does not believe them, only because he thinks the writing and the attesting signatures of the witnesses in Exhibit A differ from those of the said parties produced by the defendant. But I think the Munsif wrong for the following reasons:—The writing and signatures of Exhibit A ought not to have been compared with the other writings unless they are undisputed. Plaintiff does not admit the other writings produced. The admission of the witnesses 1 and 4 cannot place those documents beyond dispute, inasmuch as they may be said to have been tampered with, nor is it probable that if the plaintiff had forged the bond, he would not have taken care to make the bond appear as much above suspicion as possible. The defendants indirectly admit that a conditional agreement was passed with Exhibit I. The witnesses for the defendants clearly admit the fact by stating that a conditional agreement to re-purchase

the land within five years was passed on a plain paper with Exhibit I, and, considering the fact of the sale deed I having been engrossed on a stamp, it is quite possible that the said agreement would have been renewed on a stamp. The sale endorsement of the stamp used for Exhibit A shows that the said stamp was bought by order of the vendees for the express purpose of engrossing Exhibit A. The land is still in the possession of the plaintiff. The registry still stands in her name. Under these circumstances, I believe the witnesses for the plaintiff, and find Exhibit A to be genuine.

I accordingly reverse the original decree, and give judgment for plaintiff, as sued for, with costs throughout. Defendants to bear their own costs."

Against this decree the 1st and 3rd defendants preferred a Special Appeal, upon the following grounds:—

I. No time being specified in A for re-purchasing, the cause of action arose at the date of A itself, and therefore the suit is clearly barred by the Statute of Limitations as not having being brought within 12 years from that date.

II. A is besides invalid, since there was no consideration whatever for its execution two years after the date of the sale.

III. The plaintiff being in possession of the disputed lands, this suit, which is merely a declaratory one, is not maintainable.

IV. The Principal Sadr Amin has given no finding as to the truth of the tender relied upon by the plaintiff.

Sanjiva Rau for the Special Appellants, the 1st and 3rd defendants.

Nevins Pillai for the special respondent, the plaintiff.

The Court delivered the following Judgments—

INNES, J.:—We reserved judgment in this case because a question was raised in Special Appeal as to the date from which the period allowed by the Statute of Limitation should be held to commence to run.

1873. March 7. S. A. No. 310 of 1872.

The sale by plaintiff was in 1841. In 1843, according to the finding of the Principal Sadr Amin, by which we are bound, the defendant executed an agreement to plaintiff giving her a right of re-purchase. No objection has been taken to the agreement on the score of want of consideration, and if genuine, as it is found to be, and as we must therefore hold it, it may be, as suggested, the renewal of an agreement executed simultaneously with the deed of sale and therefore on sufficient consideration. But as no objection of this kind was taken to it, we need not discuss the question.

The language of the document is—"If you and your posterity pay in a lump the 175 Rupees, we will hand over the lands to you." It was contended in Special Appeal that the statutory period of 12 years would, on an agreement of this kind, run from the date of the agreement, because the terms were to give up the land 'on demand,' and the rule in such cases places the starting point of the statutory period at the date of the execution of the document. On the other side it was contended that, as the payment of the money was a condition precedent to the delivery of the land, the Statute will not begin to run until the plaintiff pays or is ready and willing to pay the money.

It has been held in regard to money obligations payable 'on demand' that the Statute runs from the date of the document, but the reason in these cases is that the words 'on demand' are not expressive of a condition, but of the obligation to pay immediately. They express in fact a *present debt*, and therefore a present cause of action, and the Statute, therefore, runs from the date of the document. But there is nothing in English law inconsistent with the rule of the Civil law, that the time runs from the date at which the right of action arises and at which the plaintiff has the power of instituting it. See Cod. VII Tit. XXXIX, 7. § 4, and Von Savigny, Vol. V, Ch : IV, Sec : CCXL. In the present case it is urged in behalf of the plaintiff (Special Respondent) that the payment of the money being a condition precedent to the right of action, the period did not commence to run at

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the date of the document, but from the date of his expressing his readiness to re-purchase. The effect of thus construing the document would be to give plaintiff and his posterity (for they are included in its terms) the right of re-purchasing at however distant a period. That this would be an extremely inconvenient construction, is readily apparent, and I think that such a construction is not necessary. The words seem to me simply to convey to plaintiff an immediate right of re-purchase; the language as to the payment of the money meaning no more than to express that the terms on which plaintiff was to have back the land were terms of paying money, *i. e.* terms of purchase. In this view the right of action accrued at the date of the agreement and plaintiff's claim is barred. I would reverse the Principal Sadr Amin's decree and dismiss plaintiff's suit.

KERNAN, J.:— In my judgment, the dealings between the plaintiff and her brother (deceased) and the defendants' ancestor, as evidenced by the Exhibits No. 1 (defendant) and A, were not had on the footing of a mortgage, or security transaction, but amounted merely to a purchase, absolute in the first instance, and a subsequent power to re-purchase given to plaintiff and her brother.

If this view is correct the plaintiff's right is barred by limitation, her suit not having been brought within 12 years from the cause of action having accrued. Now the instrument No. 1, dated the 14th Jesta 1841, is in terms one simply of absolute purchase. Then the instrument A, dated the 4th of February 1843, in the terms mentioned by Mr. Justice Innes, merely gives a power to the grantor in I to re-purchase on payment of the sum mentioned in I, as the purchase money.

It is alleged that an instrument cotemporaneous with I was executed on unstamped paper, giving the grantor a power to re-purchase in 5 years, and that A was executed as a substitution for that unstamped instrument, but leaving the time for redemption indefinite, and, for the purpose of this judgment, I assume that was so.

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It is not disputed that none of these instruments refer in terms to any loan, mortgage, or security, nor has it been alleged in the plaint in this suit that the original transaction was for a loan, or a mortgage, or for security in the nature of a mortgage.

In *Williams* v. *Owen*; 5 Myl. & Cr., 303; the question was, as in this case, whether the transaction, which in terms was one of a sale with a power of re-purchase, should be treated as a mortgage or a purchase with a power of re-purchase not executed according to the conditions.

Lord Cottenham there says, referring to the case of *Barrell* v. *Sabine*; 1 Vern. 268; the question always is "was the original transaction a *bonâ fide* sale, with a contract for re-purchase, or was it a mortgage under the form of a sale," and adds "Trying this case by the principle so long established, and settled by such high authority, what is there to shew that the transaction was in its origin a mortgage, and not a sale with a provision, under certain conditions, for a re-purchase?" If the transaction was a mortgage there must have been a debt, but how could Owen compel payment.

That judgment applies exactly to, and governs in principle this case. It has been argued that, as the annual value of the lands is alleged, and not denied, to be 170 Rupees per annum, subject only to quit rent of Rupees 27-13-7, and as the Wurg is still in the name of plaintiff's ancestors and plaintiff is in possession, admittedly, as tenant paying rent to defendant, all these facts shew the parties must have intended a mortgage. Now first, if they did so intend, they have not said so. Next I do not see any evidence that Rupees 700 was less than the value of the purchase, though it may have been at a rather depreciated price, which may have led the defendants to give plaintiff an opportunity of re-purchase. Then the fact that a period from 1841 until 1867 was allowed to pass without any tender of the Rupees 700, or other effort to re-purchase, is strong evidence to show that the purchase money was the fair value. The facts that the Wurg is still in the name of the plaintiff's ancestor and that plaintiff is tenant to the defendants, are both consistent with a purchase, as well as with a mortgage.

I conclude, therefore, in the words of Lord Cottenham, "There is indeed the want of every circumstance which in other cases has been thought necessary to give a purchase the character of a mortgage, and no proof of any intention having existed that it should be so considered."

1873. March 7. S. A. No. 310 of 1872.

Our decision is quite consistent with I Madras H. C. Rep. 460, and cases in the note, including that in 5 Moo. P. C. 72.

Holding these views, I agree with Mr. Justice Innes that plaintiff's claim is barred, 12 years from the cause of action (1843 at latest) having elapsed before suit. But, as the question of limitation was only raised in Special Appeal, and as defendants have failed in the main facts, I would direct that both parties should bear their own costs throughout.

Appellate Jurisdiction. (a)

Referred Case No. 11 *of* 1873.

A Small Causes Court is precluded, by the provisions of Section 21 of the Small Causes Courts' Act, from entertaining a review of its own judgment under Section 376 of Act VIII of 1859.

THIS was a case referred for the opinion of the High Court by V. Sundararamáyya, the District Munsif of Sholinghur, in Suit No. 642 of 1872.

1873. March 10. R. C. No. 11 of 1873.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The District Munsif refers for the decision of the High Court the question "Whether a Small Cause Court can entertain under Section 376 of Act VIII of 1859, a review of its own judgment?"

Section 46 makes the Civil Procedure Code applicable whenever there is nothing which has gone before Section 46 which bars the applicability. Section 21, making all orders and decisions final, save on the special grounds mentioned in it, is a bar to importing, from the Civil Procedure Code, another process perturbing the finality.

(a) Present:—Holloway and Kindersley, JJ.

Appellate Jurisdiction. (a)

Special Appeal No. 4 of 1873.

SUBBRAMA'NIA MUDALIAR and another...*Special Appellants.*

KALIANI AMMA'L.........................*Special Respondent.*

In a suit by the widow of one undivided brother against the survivor, for maintenance—On the question of past maintenance, *Held*, that the husband's estate in the hands of the survivor was that to which the charge attached, and that the husband's death was the period from which the Act of limitations began to run against the claim.

1873. *March* 10. *S. A. No.* 4 *of* 1873.

THIS was a Special Appeal against the decision of F. C. Carr, the Civil Judge of Tinnevelly, in Regular Appeal No. 303 of 1871, modifying the Decree of the Court of the Principal Sadr Amin of Tinnevelly in Original Suit No. 160 of 1870.

Plaintiff, the widow of the undivided brother of the defendants, claimed from them maintenance at the rate of rupees 360 per annum, together with past maintenance for 10½ years.

1st defendant, admitting plaintiff's right to maintenance, pleaded that she was not entitled to claim for her maintenance more than rupees 46 per annum. It was also argued on behalf of the defendants that the recovery by the plaintiff of past maintenance for any period exceeding three years prior to the date of suit, was barred.

The 1st issue settled was :—

Whether plaintiff's claim for past maintenance for any period exceeding three years is barred.

The Court of First Instance decreed "that defendants do pay maintenance to plaintiff at the rate of rupees 168 per annum during the term of her life, together with past maintenance at the said rate for three years preceding the date of this suit, amounting to rupees 504," and disallowed the rest of plaintiff's claim.

Plaintiff appealed against this decree, and the following judgment was delivered by the Appellate Court:—

(a) Present :—Holloway and Kindersley, J.J.

1873. March 10. S. A. No. 4 of 1873.

"The 1st question in this case is whether 10½ years arrears of maintenance can be awarded, or whether, as was ruled by the Additional Principal Sadr Amin, "arrears of maintenance for only three years can be awarded, as the past maintenance is nothing but a debt."

The plaintiff's pleader relied upon Clause 13, Section 1, of Act XIV of 1859, and upon the dictum in the case reported at 2 M.H.C.36, "If therefore the plaintiff had appealed, we should have varied the items by awarding arrears of maintenance for 12 years." This acquires additional force from the fact that, apparently, the plaintiff in that suit had only asked for five years' arrears.

I am unable to agree in the finding of the Principal Sadr Amin that only three years can be awarded: for the 13th clause is most clear on the point, where the right to receive such maintenance is a charge on the inheritance; and even on the supposition that it is not so much a charge on the property as an inherent right in the woman to share in the property, it would fall within clause 12 and similarly have a limitation of 12 years. In the case quoted from 4 M H. C. R. 137, arrears of maintenance had been awarded for 7 years, and no objection was taken to that part of the award.

Again, in the Indian Limitation Act of 1871, the same period of 12 years is allowed for a "Suit by a Hindu for maintenance."

It is perfectly true past maintenance is a debt, as stated by the Lower Court, but there are various kinds of debt, and various periods of limitation laid down for the different kinds of debt, and in this instance it is clearly 12 years.

The second point for the decision of this Court is the amount of maintenance: on that I see no reason to differ from the finding of the Lower Court.

The decree must be modified accordingly, and will adjudge that defendants do pay maintenance to the plaintiff at the rate of rupees 168 per annum for the term of her life; commencing from November 23rd 1871, which is one year from the date of the plaint, together with past maintenance at the said rate for 10½ years, viz. rupees 1,764,

1873. March 10. S. A. No. 4 of 1873.

The defendants appealed on the ground that the plaintiff's suit in part was barred by Act XIV of 1859.

Shephard for the special appellants, the defendants.

Scharlieb for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—Mr. Shephard argues that this claim is barred because the property has not descended and because the estate upon which the maintenance is to be charged is not that of the person who has died.

The claim is by a widow of one undivided brother against the survivor. During the life of the husband, the estate was that of the two brothers. At the death, according to the modern doctrines of Hindu law, the whole estate came to the brother, leaving the widow merely with a claim for maintenance. That claim was a charge on the estate. The inaccuracy of the language used has been before pointed out. By the death the surviving brother's estate was enlarged, and the measure of the enlargement came to him by inheritance in the only sense in which this English term is applicable in Hindu law. During the marriage and the life of the husband the claim to maintenance against his estate was a mere possibility. If he had wrongfully put her away, ill-treated her, so as to entitle her to go away, or refused to support her, the possibility would in his life time have become a present interest. It is manifest, therefore, that the right is a charge on the husband's estate in some circumstances while he still lives,—in all cases when he lives no longer. That husband's estate in the hands of the survivor is, therefore, that to which the charge attaches, and the husband's death is the period at which the Statute begins to run against the claim.

Appellate Jurisdiction. (a)

Special Appeal No. 230 *of* 1873.

RA'MU NAIKAN..............................*Special Appellant.*
SUBBARA'YA MUDALI......................*Special Respondent.*

A prior mortgagee, having purchased, may still use his mortgage as a shield against the claims of subsequent mortgagees.

THIS was a Special Appeal against the decision of C. G. Plumer, the Civil Judge of Chittúr, in Regular Appeal No. 168 of 1872, modifying the Decree of the Court of the District Munsif of Sholinghúr in Original Suit No. 282 of 1871. 1873. *May* 23. *S. A. No.* 230 *of* 1873.

The facts sufficiently appear in the following judgment of the Civil Judge:—

"In this case the plaintiff sued to recover the amount due under a mortgage bond, (A), executed in his favor by 1st defendant in 1869, by means of the mortgaged property. The 1st defendant admitted the execution of the bond sued on and did not contest plaintiff's claim. The 2nd defendant pleaded that the property mortgaged under 'A' had been mortgaged to him under various bonds executed by 1st defendant's father between 1861 and 1870.

There is no doubt of the genuineness of the bonds filed by 2nd defendant, nor can there be any doubt of the priority of his mortgage over that of plaintiff.

The 2nd defendant obtained a simple money decree on his bonds and attached the mortgaged lands; they were sold at auction and purchased by the 2nd defendant himself for a sum considerably less than the amount of his claim against the 1st defendant under the several deeds of mortgage.

The 2nd defendant contests plaintiff's claim in a double capacity as prior mortgagee of the lands which the plaintiff seeks to have held liable for his debt under 'A' and as actual proprietor and possessor of those lands.

The decree of the 2nd defendant being a simple money decree, without any reference being made in it to his mortgage

(a) Present :—Holloway, Ag. C. J. and Kindersley, J.

1873. May 23. S. A. No. 230 of 1873.

lien, he, when he purchased the lands in auction, took them, of course, subject to all existing charges; so that, as proprietor of the lands, he could not successfully prevent the lands from being held liable to plaintiff's mortgage lien.

But, as prior mortgagee, he undoubtedly has the right to have these lands held liable for his debt, first. These lands have been actually sold for a sum insufficient to discharge the mortgage debt due by 1st defendant. All the questions at issue between the plaintiff and 2nd defendant are in litigation in the present suit, and I consider that it would be needlessly multiplying suits to say to 2nd defendant—You must bring a suit to establish your lien—as he, undoubtedly, must succeed, because his mortgage lien is undoubtedly prior in date to that of plaintiff.

I hold that, as prior mortgagee, the 2nd defendant is entitled to resist plaintiff's demand; that the lands should be held liable to his bond-debt, as in point of fact the lands have been proved insufficient to satisfy 2nd defendant's debt alone.

I reverse so much of the judgment of the District Munsif as holds the lands mortgaged under 'A' liable for plaintiff's claim, and I direct that plaintiff do pay the costs of 2nd defendant, Original and on appeal."

The plaintiff preferred a Special Appeal to the High Court on the following grounds:—

I. The Civil Judge is wrong in saying that the disputed lands cannot be held liable to plaintiff's claim because the 2nd defendant possessed a prior mortgage claim over the same, and because the proceeds of the sale of the lands were considerably less than the amount due to the 2nd defendant.

II. The decree obtained by the 2nd defendant not giving him any lien over the lands, the 2nd defendant has not his lien over them.

III. Even if that were not so, he is, as purchaser of the equity of redemption, liable to all mortgages created by the mortgagor, whether prior or subsequent to his (2nd defendant's) own mortgage.

Sunjiva Rau for the special appellant, the plaintiff. 1873. *May* 23.

Nallathumby Mudaliar for the special respondent, the 2nd defendant. *S. A. No.* 230 *of* 1873.

The Court delivered the following

JUDGMENT:—The question is whether the prior mortgagee, who has purchased, is, or is not, able to protect himself against payment of the whole demand of a subsequent mortgagee. Whether, in fact, there has been a complete confusion of his own security and he stands simply in the place of the original mortgagor.

The English doctrine may, perhaps, now be stated to be that such a purchaser is postponed to subsequent incumbrances of which he has notice; unless distinct steps are taken to keep his own alive (*Watts* v. *Symes*, 1. DeG. M. & G. 240: *Garnett* v. *Armstrong*, 4 Dru. & War, 198 : where, perhaps, "of which he has actual or constructive notice" should be inserted after "puisne incumbrance." *Heyden* v. *Kirkpatrick*, 34 Beav, 645). In these later cases the Judges have sought to mitigate the rigidity of the doctrine of Sir W. Grant in *Toulmin* v. *Steere*, 3 Mer. 210.

The whole doctrine stands upon the assumed impossibility of a man having a right of pledge over his own—a concept which Puchta declares to be a monstrosity. Arndts, Dernburg, Windscheid, and others, justly observe that logical antinomy is more easily to be borne than a doctrine which fails to deal fairly with the rights of the parties [See Dernburg, II, 570 *et seq*: "Law does not exist for the sake of "formalism; on the contrary, formalism is to subserve legal "interests. Since there was no substantial ground for "rendering the thing pledged practically unpurchaseable by "the pledge creditor, since the rights under the subsequent "hypothesis remained unchanged by the purchase of the prior "pledgee, the prior had a right to maintain in presence of the "subsequent his original situation"] and these two great lawyers maintain that Roman law did protect the prior mortgagee after he had become the purchaser. Vangerow and many others maintain that there was confusion, except in

1873. May 23. S. A. No. 230 of 1873.

the cases of ignorance by the buyer of his own right of pledge, or of the subsequent ones. The better opinion seems to be that the rule of law was narrowed by no such exceptions.

Dernburg justly observes that the subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the prior mortgagee.

It seems to us that the rule, as thus laid down, is the true rule and the one to which the minds of the English Judges are gradually tending. Not being bound by the English rule, we decide that the prior mortgagee may still use his mortgage as a shield and that this appeal must be dismissed with costs.

Appellate Jurisdiction. (a)

Criminal Petition No. 43 of 1873.

THE COLLECTOR OF SALEM..................*Petitioner.*

A Rupees 50 Currency note was changed by one M. at the Government Treasury on the Shevaroy Hills. Said M. was subsequently convicted by the Sessions Court of Salem of having stolen the note from one S. The note was produced in evidence at the trial and the Court directed it to be given up to S. from whom it had been stolen. *Held,* that the Sessions Court was wrong. That a note of this kind being in legal view money, the property in it passes by mere delivery, and that nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon the rule.

THIS was a Petition under Section 404 of the old Code of Criminal Procedure, praying the High Court to revise the Proceedings of the Court of Session of Salem, dated 21st October 1872, No. 209.

1873. *February* 6. *Crim. Petn. No.* 43 *of* 1873.

The Petition presented by the Collector of Salem, stated the following facts—

"A Rs. 50 Currency note was changed by one Muppen at the Government Treasury on the Shevaroy Hills. The said Muppen was subsequently convicted by the Sessions Court of Salem of having stolen the said note from a Mr. Slater. The said note was sent for by the committing Magistrate from the Salem Treasury and was produced in evidence before the Sessions Court.

By Proceedings, dated 21st October 1872, the Sessions Court directed the said note to be given up to the said Mr. Slater from whom the same was stolen.

Petitioner submits that the said order is erroneous and that the said note is the property of Government as *bonâ fide* holders for value without notice of the theft.

Petitioner therefore prays this Honorable Court, under Section 404 of the Criminal Procedure Code, to send for the Record of the said Proceedings of the Sessions Court of Salem and to order that the said note be given up to Petitioner as the property of Government."

The Government Pleader for the Petitioner.

The Court delivered the following

JUDGMENT :—The question is whether the Salem Treasury, or the person from whom it was stolen, is entitled to a Currency note.

(a) Present :—Holloway and Kindersley, J J.

1873. February 6. Crim. Petn. No. 43 of 1873.

The Sessions Judge has decided the case upon an illustration drawn from the new Contract Act, embodying a very old rule of law, that possession by the taker in good faith is no defence against the owner of a chattel whose possession was lost through theft.

The decision is inapplicable to the case, for money, and a note of this kind is in legal view money, does not stand upon the footing of other chattels (*Foster v. Green*, 7 H. & N. 881). In the language of the English law the property passes by mere delivery, and, in the interests of commerce and the security of human dealing, nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon the rule (*Goodman v. Harvey*, 4 Ad. & El. 870). Here the Treasury was bound to cash the note and the original owner has no claim against it.

The order must be reversed.

Appellate Jurisdiction. (a)

Regular Appeal No. 119 *of* 1872.

VAKATY RAMAREDDY ....*Appellant.*

DUVVURU AYAPPAREDDY, and 9 others......*Respondents.*

An agreement between a landlord and tenant in the Presidency of Madras for more than one year is a pattah within the meaning of Act VIII of 1865, and consequently exempted from registration under Act XX of 1866.

1873. February 28. R. A. No. 119 of 1872.

THIS was a Regular Appeal against the decision of J. R. Cockerell, the Civil Judge of Nellore, in Original Suit No. 21 of 1871.

V. Sanjiva Rau, for the appellant, the 2nd defendant.

Miller, for the respondents, the plaintiffs.

The Court delivered the following

JUDGMENT :—The question referred to the full Court for decision was—

Whether an agreement between a landlord and tenant in the Presidency of Madras for more than one year is a pattah within the meaning of Act VIII of 1865, and consequently exempted from registration under the Act XX of 1866 ?

The Court decide the question in the affirmative.

(a) Present :—Morgan, C. J., Holloway and Kindersley, J J.

Appellate Jurisdiction. (a)

Regular Appeal No. 139 *of* 1872.

J. H. IRVINE............................*Appellant.*

THE THACHARAKAVIL MANA VIKRAVEN TIRAMELPAD of Nilambúr. } *Respondent.*

The suit was brought to cancel a decision of the Magistracy (A), dated 11th December 1869, whereby 1st defendant was put in possession of the Choladi forest, to establish plaintiff's jenm right thereon, and to recover the same with Rupees 14,000, value of timber. The facts, as they appeared, were that there was a coffee estate called Choladi, carved out of the same jungles as that in which the Choladi forest was, but not adjoining it and in a different taluq. The cultivation of that estate was begun in 1862 by a Mr. Gordon, who in 1865 transferred his interest to a Mr. Burnett, who, in 1867, was succeeded by 1st defendant (Irvine). In the following year 1st defendant proceeded to lay claim to the land in dispute, and in 1868 he prosecuted some hill-men for trespass and had their crops attached. In June 1869 he procured an order from the Deputy Magistrate whereby the Gudalúr Sub-Magistrate was ordered to attach certain lands (no boundaries being specified). The land and timber thereon were accordingly attached and an order of attachment served on plaintiff. The case then came before the Assistant Magistrate, who, after holding an enquiry as to possession, passed the order (A) cancellation whereof is prayed in the plaint.

The District Judge found that down to the interference of the Magistrate in 1868, plaintiff was in possession as owner, and he further decreed that defendant should pay plaintiff Rupees 14,000 on account of the timber, which had been carried off, by whom it did not appear.

On appeal, the High Court confirmed the decision of the District Judge on the question of title, but reversed it as to the value of the timber carried off, because there was not that causal connection between its loss and a wrongful act of the defendant which was needed to justify the award of that sum as damages. There was no evidence of the mode of the loss. The occasion for it was given by an order of a Magistrate, and the mere preferring of the complaint which gave birth to that order did not render the defendant responsible in the circumstances of the case.

THIS was a Regular Appeal against the decision of G. R. Sharpe, the District Judge of Calicut, in Original Suit No. 4 of 1870. 1873. *April* 1. *R. A. No.* 139 *of* 1872.

The suit was brought to cancel a decision of the Magistracy, dated 11th December 1869, whereby 1st defendant was put in possession of the Choladi forest, to establish plaintiff's jenm right thereon, and to recover the same with Rupees 14,000, value of timber. The plaint stated that the said forests were in the possession of plaintiff's ancestors and of himself after his attaining the karnavanship in 1036, that defendants had no right thereon and never held possession thereof, that the Magistrate, by the above order,

(a) Present :—Holloway, Acting C. J. and Innes J.

1873. April 1. R. A. No. 139 of 1872.

directed that 1st defendant should retain possession, and that 128 logs of timber, valued at Rupees 14,000, and felled by plaintiff in Edavom and Mithunom 1044 were by another order, dated 19th June 1869, made over to 1st defendant by the Magistracy.

1st defendant stated that plaintiff had no title, that the 3rd defendant was the owner of and demised the land on kánam for 80 years to 2nd defendant on 9th July 1862, that 2nd defendant on 18th July 1865 transferred his right to one John Burnett, that 1st defendant received the said lands as successor of the said John Burnett in the management of the Choladi Estate, that plaintiff had not been in possession or lawfully exercised any acts of ownership since 9th July 1862, that in felling the above timber plaintiff was a trespasser, that upon his (1st defendant) immediately complaining to the Magistrate the timber was attached, that he did not remove nor interfere with the said timber, but that plaintiff by his servants wrongfully removed the same and converted it to his own use, and that the timber is of greater value than is stated in the plaint.

2nd and 3rd defendants did not appear.

The following issues were settled—

I. Who is the owner of the jenm right of the land sued for.

II. Who was in possession, and on what right, prior to the Magistrate's order, dated 11th December 1869.

III. What became of the timber (128 logs) after its attachment by the Magistracy in 1869.

The following is taken from the judgment of the District Judge—

" The land which forms the subject-matter of this suit is jungle, and bears the name of Choladi; and the main question for determination is whether it is plaintiff's jenm property or is the jenm of 3rd defendant, through whom the other defendants claim, and who has been examined as 1st defendant's 5th witness. It is admitted that such witness owned a jungle called Choladi, and that 1st defendant is now in possession of a coffee estate called by that name and carved

out of that jungle, but with the exception, perhaps, of a few yards, that estate does not come below the crest of the ghaut, whereas the land in dispute is below the ghaut and slopes away for a mile and more to the Chaliar river which 1st defendant claims as the boundary of his estate.

The cultivation of that estate appears to have been commenced in 1862, when a Mr. Gordon (2nd defendant) obtained a mortgage under No. I from 3rd defendant. In 1865 Gordon, under No. II, transferred his interest to a Mr. Burnett (1st defendant's 2nd witness) and in September 1867, 1st defendant, as he tells us in his deposition, assumed charge of the estate. Simultaneously, or rather in the following year, he proceeded to lay claim to the land in dispute and prosecuted some hill men for trespass by cultivating a portion of it. The Gudalúr Sub-Magistrate lent a willing ear to his complaint; for admitting that there was no evidence against the parties complained against, and that what evidence there was shewed that he had no jurisdiction over the locality, he still continued to detain the accused in custody, and to hold the crops under attachment. What became of the accused does not appear, but in May 1869, the Deputy Magistrate of Wynaad ordered the release of the crops on the ground that 1st defendant had not attended to prosecute.

This did not meet 1st defendant's views, so in the following month, *i. e.* June 1869, he appears to have given a deposition before the Deputy Magistrate which resulted in the remarkable order (F) whereby the Gudalúr Sub-Magistrate was ordered to attach certain lands: no boundaries were specified in the order, and the Deputy Magistrate, though declaring his inability to say who was in possession, quietly assumed such lands to belong to 1st defendant's Choladi Estate. The Gudalúr Sub-Magistrate deputed his gomastah to carry out the Deputy Magistrate's order, and accordingly the plaint land and the valuable timber thereon were attached, the plaintiff being at the same time served with an order of attachment (F). A young Assistant Magistrate then appears upon the scene, and he, after holding an enquiry as to possession, passed the order (A), the cancellation whereof forms one of the prayers of the plaint.

1873. April 1. R. A. No. 139 of 1872.

The 1st defendant has thus the advantage of having an order of the Magistracy on his side, and although looking at the statement of the evidence upon which that order purports to be founded, I should have found it difficult to arrive at the same result, and although it is impossible to say how far Mr. Austin in arriving at it was influenced by the *ex-parte* declaration of the Deputy Magistrate, still the effect of that order is to throw the burden of proof upon plaintiff, and I now proceed to consider whether he has successfully sustained it."

The District Judge then commented upon the evidence adduced by plaintiff and continued—

" I entertain, therefore, no doubt upon the direct evidence of plaintiff's ownership and possession, but there is much more in his favor. The land in dispute is admittedly below the crest of the ghaut, and land so situated is shewn by the Amshom officials of both taluqs to be in Ernad and not in Wynaad taluq; nay, even 1st defendant in his deposition admits this to be so. How in the face of all this and with title deeds registered in the Gudalúr registry only, 1st defendant can have been rash enough to go before the Magistrate and enter into conflict with plaintiff respecting land in the Ernad taluq, is a mystery past my understanding.

But very little consideration would have satisfied him that an experienced coffee planter like 2nd defendant would not have taken precipitous land unfit for his purposes, and as little consideration would have satisfied him that a land owner would not have parted with such extensive and heavily timbered land for next to nothing at all."....................

" I am satisfied that down to the interference of the Magistrate in 1868, plaintiff was in possession as owner, and I am fortified in that conclusion by the non-denial in 1st defendant's written statement of such possession prior to 1862.

It still remains to consider plaintiff's claim to the timber or its value. There is no dispute that such timber was felled by plaintiff from the plaint land, and that in pursuance of the order of the Deputy Magistrate an officer was sent to the spot and attached it. As to what then took place, there is, unfortunately, a conflict of testimony. On plaintiff's side two witnesses depose that 1st defendant said he would take

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charge of the timber, and to the same effect is H, the Officer's Return, which states that the Amshom officials declined to have anything to do with it, but that 1st defendant said he would look after it to prevent any one removing it. This 1st defendant does not admit, but from the evidence and the conduct of the attaching officer it must be presumed that 1st defendant at all events conveyed that impression to the bystanders and to that officer. It is certain also that 1st defendant's carpenter was present and marked some of the logs, and by his letter (No. V) 1st defendant would appear to have been active in the attachment. It would therefore be very difficult for me to say, were it necessary to decide the point, that 1st defendant did not put himself in the position of custodian of the timber, but as 1st defendant's liability appears to me otherwise clear a decision is not absolutely called for on that point.

The timber was in plaintiff's possession and of that possession he has been divested by an attachment of defendant's procuring, while the only ground upon which 1st defendant by his statement alleged non-liability to reimburse plaintiff was that plaintiff had himself recovered possession. I think it is much to be regretted that any such insinuation was made; there is not a tittle of evidence in its support, and it can never have been imagined that any Court would presume the commission of an audacious trespass by plaintiff in direct defiance of a Magistrate's order.

This is sufficient for the disposal of the case, and I need not discuss the point which has been present to my mind, but which has not been raised for 1st defendant, *i. e.* whether he could not have sheltered himself under the plea that the attachment and consequent loss was the act of the Court. In the circumstances I have not considered the question with much attention, but it appears to me that it would not have been a good defence, inasmuch as the matter was not fully laid before the Deputy Magistrate, but the order was obtained on an *ex-parte* application and from a Magistrate who had no jurisdiction, and whom 1st defendant must have known to have no jurisdiction over the *locus in quo*.

Being of opinion that 1st defendant was a wrong doer and trespasser, or that having procured the commission of the

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trespass he must be held liable as a wrong doer and trespasser, I declare that plaintiff is the jenmi and as such is entitled to recover possession of the property sued for, as delineated in the plan D, exclusive of such small portion (if any) below the crest of the ghaut as defendants may prior to 1868 have planted coffee upon; and I further decree that plaintiff be put in possession of the said property and do recover from 1st defendant Rupees 14,000 on account of the timber, and all his costs of suit. The 1st defendant will bear his own costs."

The first defendant appealed upon the following grounds among others :—

1. That the judgment of the Lower Court is contrary to law and against the weight of evidence.

2. That 1st defendant is not liable to make good to the plaintiff the damage claimed in the plaint.

3. That the damages fixed by the Lower Court are excessive.

Miller and Shaw for the appellant, the first defendant.

J. H. S. Branson for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—On the question of title there cannot be the least hesitation in confirming the decree of the District Judge. The evidence is nearly all one way and the testimony of the witnesses, mostly officials, is confirmed by the fact that the land claimed by the plaintiff is in one taluq while that bought by the lessor of defendants was registered solely in another. As to the vagueness of which the appellant complains, it is probable that the decree preserving to the defendant what he has actually cultivated is a little too favourable. The evidence, as it stands, undoubtedly justifies a decree for the whole land claimed.

While the burden of proof is on the plaintiff, it is one more easily sustained in a case in which he has been put to his action for land of which there has been scarcely any user by the not very judicious proceedings of the Magistracy.

As to the value of the timber carried off, we are of opinion that the decree cannot stand, because there is not that causal connexion between its loss and a wrongful act of

the defendant which is needed to justify the award of that sum as damages.

If the agreement to be custodian of the logs were proved, it would become necessary to consider whether there was *culpa*, and the nature of the place and of the property and of the circumstances in which the custody was undertaken would make the mere loss very slight evidence of negligence.

Then is the defendant liable because the loss occurred immediately through the act of the Magistrate, but mediately through the complaint, now known to be unfounded, preferred by him to that Magistrate. There can be no pretence that there was fraud on the part of the defendant himself, for there is no reason to doubt that he merely set up a claim which, on the information of his lessor and of the vendee of that lessor, he might well believe to have a fair foundation. It cannot, therefore, be said that the operations of the Magistrate, which placed the timber at the place from which it was wrongfully carried away by some one, were even within so strong a case as *Fitzjohn* v. *Mackinder* (a) the legal result of the defendant's act. That very eminent lawyers dissented from that decision and that one of them still adheres to his dissent (Wm. Saunders I, 276) shews that it goes to the very verge of the law. In this case, however, there is not the smallest evidence that the complaint was fraudulent and it was certainly not for the defendant to know more of the jurisdiction of the Magistrate than he knew himself. There is not the least evidence as to the mode by which the timber was carried off, and it is very singular that the plaintiff with his many dependents was unable to give any such evidence. It is not for us to speculate upon the mode.

It is sufficient in this case to say that there is no evidence of the mode of the loss. That the occasion for it was given by an order of a Magistrate. That the mere preferring of the complaint which gave birth to that order does not render the defendant responsible in the circumstances of this case. The decree must be modified by disallowing the value of the timber. There will be no costs of this appeal.

Decree modified.

(a) 9, C. B. N. S. 505.

Appellate Jurisdiction. (a)

Regular Appeals, Nos. 100 *and* 107 *of* 1872.

G. LEE MORRIS, ESQ., Manager and Receiver of the Estate of His Highness the late Maharajah of Tanjore. } *Appellant.*

SIVARAMAYYAN and 192 others.........*Respts. in No.* 100.

CHINNASAMI AYYAN, and 46 others ...*Respts. in No.* 107.

Suits by the Receiver of the Tanjore Estate to recover rent due under muchalkas executed by defendants, the Mirasidars of certain villages, agreeing to take the villages on rent for 5 Fuslies from 1273 to 1277 at an annual rent. The defendants pleaded Act XIV of 1859 as to part of the rent claimed. The plaintiff claimed to be entitled to the advantage of Sec. 14 of that Act, because he was for a time prosecuting suits against defendants separately for the arrears of rents alleged to be barred, all which suits were dismissed on the ground that plaintiff could not sue the defendants separately while they had executed the muchalka jointly. The District Judge found for the defendants on the questions on the Act of Limitation. *Held*, on appeal, that the period of limitation applicable to a suit for rent was 3 years (under Act XIV of 1859), and that as to the claim to the exception under Sec. 14, it failed at every turn. The cause of action was not the same, for there the obligation sued upon was several, here it is joint. The Court which decided the former suits not only did not fail to decide them but did decide them.

1873. *March* 3. *R. A. Nos.* 100 & 107 *of* 1872.

THESE were Regular Appeals against so much of the decisions of F. M. Kindersley, the District Judge of Tanjore, in Original Suits, Nos. 1 and 2 of 1870, as dismissed plaintiff's claim for arrears of rent for Fusly 1275.

The suits were brought by the Receiver of the Tanjore Estate to recover rent due under muchalkas executed by defendants, the Mirásidárs of certain villages, agreeing to take the villages on rent for 5 Fuslies from 1273 to 1277 at an annual rent.

The defendants pleaded the Act of Limitation (XIV of 1859) as to part of the rent claimed.

The facts in each case were similar.

The following is taken from the judgment of the District Judge in O. S. No. 2 of 1870, in which the necessary facts appear.—" The first point raised is what is the period of limitation allowed by the Act. The plaintiff contends that it is a suit to enforce a written contract, and that Clause 16, Section 1, Act XIV of 1859 applies : but though there is a written agreement, it seems to me quite

(a) Present :—Morgan, C. J., and Holloway, J.

clear that it is an agreement to pay rent, and that the limitation period is therefore three years under Clause 8. This suit was instituted in February 1870, and, therefore, all rent due prior to February 1867 is barred unless plaintiff can show some reason why the limitation period did not run against him."........

"I conceive then that all that is barred is the claim for Fusly 1275, unless plaintiff can show cause why the limitation period should not be enforced, and it remains to be seen whether plaintiff has shown any such cause."

He claims to be entitled to the advantage of Section 14 of the Limitation Act because he was for a time prosecuting suits against these defendants separately for the arrears of Fusly 1275, all which suits were dismissed on the ground that plaintiff could not sue the defendants separately while they had executed the muchalka jointly..

The question is whether time so occupied is to be excluded under Section 14 in computing the period of limitation, for it is admitted that if that time is to be excluded then the arrears for Fusly 1275 will not be barred.

I have considered this point carefully, and though it may seem hard on the plaintiff, I think he is not entitled to the benefit of Section 14. It seems hard, because it is beyond question, that for many years past it was usual to treat muchalkas similar to that now sued on as giving a separate right of action against each tenant, and each tenant was looked upon as answerable for rent only proportionate to the extent of his holding. Plaintiff therefore in bringing his separate suits was only following the course that had been followed for some years and believed himself no doubt to have a *boná fide* right of action against each individual tenant. But it has been ruled by the High Court in *G. Lee Morris* v. *Panchanada Pillai and another,* (V. M. H. C.R. 135) that plaintiff had not and could not have such separate rights of action under these muchalkas.

Now Section 14 of the Limitation Act requires that the plaintiff should have been *boná fide* and with due diligence

1873. March 3. R. A. Nos. 100 & 107 of 1872.

prosecuting a claim on the same cause of action against the same defendant, or some person whom he represents, in some Court which from defect of jurisdiction or some other cause shall have been unable to decide upon it.

In the present case there was no defect of jurisdiction, and the cause why the former suit was dismissed was of a totally different nature because plaintiff had not brought his suit in a proper form. And it can hardly be said that plaintiff was in those former suits claiming on the same cause of action. In this suit he claims under a joint muchalka executed by all the defendants, but in those suits he claimed under separate specific contracts entered into by each defendant. That was clearly his case in those suits, for he sought to adduce evidence to show such separate specific contracts. Not being able to prove those separate contracts he now falls back on the joint contracts, but it cannot, I think, be said that under these circumstances plaintiff is suing on the same causé of action as in those former separate suits.

Judgment will be that plaintiff do recover the amount sued for minus the amount claimed for Fusly 1275. Plaintiff will also recover costs on the amount decreed but must pay defendant's costs on the amount disallowed. Interest at 6 per cent. per annum will be allowed on the amount decreed and on the costs from this date to date of payment.

The plaintiff appealed on the ground that the said claim for rent for Fusly 1275 is not barred by the Limitation Act.

In R. A. Nos. 100 & 107, *Handley* for the appellant, the plaintiff.

In R. A. No. 100, *V. Sanjiva Rau* for the 107th and 116th respondents, the 107th and 116th defendants.

In R. A. No. 107, *A. Ràmachendraiyar* for the 1st and 18th respondents, the 1st and 21st defendants.

The Court delivered the following

JUDGMENT :—The only questions are on the statute of limitation. As to the period applicable to a suit for rent, we have no doubt that the period is 3 years under Clause 8.

Then as to the claim to the exception of Section 14, it fails at every point. The cause of action was not the same, for there the obligation sued upon was a several one, here it is joint. The English test is—would the same evidence support each suit? So far is this from being the case that the evidence which sustains this suit defeated those. The Court which decided the former suits not only did not fail to decide them but did decide them. The decrees of the Civil Judge must be confirmed and these appeals dismissed with costs.

1873. *March* 3. *R. A. Nos.* 100 & 107 *of* 1872.

Appeals dismissed.

Appellate Jurisdiction. (a)

Special Appeal, No. 382 *of* 1871.

CHINNARA'MAKRISTNA A'YYAR..............*Special Appellant.*
MINATCHI AMM'AL, and 2 others..........*Special Respondents.*

An adopted son does not succeed to the estate of his adoptive mother's father in preference to the son's son of the brother of the adoptive mother's father.

1873. *March* 10. *S. A. No.* 382 *of* 1871.

THIS was a Special Appeal against the decision of F. S. Child, the Civil Judge of Tinnevelly, in Regular Appeal, No. 141 of 1869, confirming the Decree of the Court of the Principal Sadr Amin of Tinnevelly in Original Suit No. 177 of 1866.

The suit was brought to obtain a declaration of the plaintiff's right to the reversion of certain land and a house, on the ground that the first defendant, who was the widow of the former owner of the property and held it as a tenant for life, had made alienations in favor of the defendants, Nos. 2 and 3 to the prejudice of the plaintiff's reversionary right. It was conceded that the plaintiff was the divided grand-nephew of the first defendant's husband.

The first defendant denied the alienations said to have been made by her and added that her younger daughter having died issueless, she delivered up the whole estate to her eldest daughter, who was the next legal heiress,—that she too died afterwards leaving behind an adopted son named

(a) Present :—Innes and Kernan, J J.

1873. March 10. S. A. No. 382 of 1871.

Visvanadhan. That this boy by law already inherited the estate, and had a title preferential to that of the plaintiff.

Among the issues settled the first was—

After the first defendant's death, who is entitled to succeed to her husband's estate, the plaintiff, or the first defendant's daughter's adopted son.

This issue the Principal Sadr Amin found in favor of the adopted son. The question did not come before the Lower Appellate Court, but was raised in Special Appeal by the plaintiff in the following grounds—

The plaintiff as brother's son to the 1st defendant's husband deceased has, by Hindu law, a right to succeed to the property of the latter in preference to his daughter's adopted son,

A daughter's adopted son is not in the line of heirs of his maternal grandfather.

Handley, for the special appellant, the plaintiff.

O'Sullivan, for the 1st special respondent, the 1st defendant.

The Court delivered the following

JUDGMENT :—The question here is whether an adopted son succeeds to the estate of his adoptive mother's father, in preference to the son's son of the brother of the adoptive mother's father. In other words whether he succeeds in all respects as a son, not only to the adoptive father's estate, but also to the estate of his adoptive maternal ancestors. This question of law was not before the Civil Judge. The Principal Sadr Amin, however, before whom it formed one of the matters in issue, has discussed it and has arrived at a conclusion favorable to the succession, in such circumstances, of the adopted son. Under the law governing in Madras plaintiff is not a Sapinda of the person to whose estate he lays claim and can only succeed as a bandhu. Now the adopted son, if in a position to succeed at all, is certainly nearer than and therefore prior to the plaintiff. To affirm plaintiff's title, therefore, is to deny that the adopted son is even related as a bandhu to his adoptive

mother's father. The principal Sadr Amin has misread the passage which he quotes from Macnaghten,(*a*) as the effect of it is that adopted sons succeed *collaterally* in *the family* of *their adoptive father* as *sons* but *not* in the family of their adoptive mother; which is against in place of being in favor of the view taken by him.

The *Dattaka Mimamsa* is undoubtedly in favor of such succession, but the general current of Hindu authority is altogether silent upon the point. Nor have we been referred to any decisions in this Presidency which could throw light upon the matter. A very learned judgment of Mr. Justice Sambonath Pandit, of the Bengal High Court was, however, cited, and we find the point there most fully and ably considered. The result arrived at in that judgment is that the adopted son has no such right as that contended for. And the grounds on which it proceeds may be thus summarized.

There is no direct text of Hindu law, with exception of those in the *Dattaka Mimamsa*, nor is there any case to be found in either of the Presidencies favoring such a right. Why should the claim be of so rare occurrence if there is any foundation for the right? Then, there is an utter silence of the law in parts of it where it might be peculiarly expected to speak out upon this subject—as where barrenness and childless widowhood are spoken of as bars to inheritance; and where the expression 'capable of bearing children' occurs. What then are the arguments in its favor apart from the texts above referred to? 1st, There is the argument drawn from the principle of reciprocity founded upon a Bengal decision in 1859, the authority of of which is doubtful. It was there decided that the relations of an adoptive mother inherit the property of her adopted son just as they would inherit the property of her natural son. But, says Mr. Justice Sambonath, assuming for the sake of argument the correctness of the decision he is quoting, "such reciprocal rights are not *invariably* any part of "the Hindu system of succession", and he gives instances of this want of reciprocity. Then there is the argument drawn from the unfairness of the position in which the

(*a*) *Hindu Law*, p. 78, 3rd ed.

1873. March 10. S. A. No. 382 of 1871.

adopted son would be placed if, by adoption out of his natural family, he were to lose a particular line of inheritance altogether. The answer to this is that in other respects also an adopted son is undoubtedly worse off than a son of the body, as in the case of a son being born to the adoptive father subsequent to the adoption, in which case the adopted son takes a very much diminished share. And although it is settled law that an adopted son succeeds collaterally in the family of his adoptive father, it is not yet decided whether he succeeds as a collateral to a full share, or only to the same proportionate share that survives to him in the case of after born sons on the death of the adoptive father.

The whole system, as Mr. Justice Sambonath points out, is an anomaly and full of injustice both to the adopted son and to others. The fact remains that in some respects the adopted son is in a worse position as regards the estate of his adoptive father than a son of the body, and there is therefore room for question whether he is qualified, as a son of the body of his adoptive mother would be, to inherit the estate of his maternal grandfather.

Now, as observed before, there are no decisions in favor of the doctrine, or against it, except the one just quoted. The claim apparently has never been made and, excepting two texts in *Dattaka Mimamsa,* the law is silent where it would almost certainly have spoken if such a right had existed.

With regard to the texts referred to they appear rather to be deduced by way of argument from other admitted legal positions than to assert positively what the law on the point is, as derived from the sages of antiquity, or as handed down by tradition, or established by custom. We think, therefore, that the minor adopted son does not succeed at all, and that plaintiff, as a Bandhu, is entitled to the declaratory decree asked for as between him and the defendants. We therefore make this decree in reversal of the decisions below.

The plaintiff is entitled to his costs in this and the Lower Courts.

Appeal allowed.

1873.
April 28.
R.C. No. 23
of 1872.

Appellate Jurisdiction. (a)

Referred Case No. 23 of 1872.

LIEUTENANT COLONEL C. E. BATES..........*Plaintiff.*

THE MUNICIPAL COMMISSIONERS FOR THE TOWN OF BELLARY ... ... *Defendants.*

Plaintiff sued the Municipal Commissioners for the town of Bellary for a certain sum, alleged to have been illegally levied by them from him as his trade and profession tax. The sanction of the Governor in Council, under Sec. 38 of Madras Act III of 1871, was obtained on the 4th July 1871, with authority to levy the tax from 1st May 1871. Plaintiff alleged that no notice under Sec. 61 of the Act, had been served upon him, that the levying the tax was illegal as the approval of Government was obtained three months after the commencement of the official year and that the Act could not have retrospective effect. *Held,* on a reference, that the levy from the plaintiff was illegal.

THIS was a case referred for the opinion of the High Court by Captain G. H. Oakes, the Judge of the Cantonment Court of Small Causes at Bellary.

No Counsel were instructed. The facts sufficiently appear in the following

JUDGMENT:—The Plaintiff sues the defendants, the Municipal Commissioners for the Town of Bellary, for a certain sum, alleged to have been illegally levied by the defendants from him as his trade and profession tax, with interest, &c. The sanction of the Governor in Council under Section 38 of Act III of 1871, was obtained on the 4th July 1871, with authority to levy the tax from 1st May 1871. The Plaintiff states that no notice, under Section 61 of Act III of 1871, was served upon him, that the levying of the tax was illegal, as the approval of Government was obtained three months after the commencement of the official year, and that the Act cannot have restrospective effect. The questions referred are—

(1.) Can the levying of the tax have retrospective effect?

(2.) Is it essential that notice in writing under Section 61 must be given to persons liable to the tax before the Municipal Commissioners can legally levy it?

(a) Present:—Holloway, Ag. C. J. and Kinderaley, J.

1873. April 28. R. C. No. 23 of 1872.

The Act so far as the plaintiff was concerned imposes a new tax. The sections under which it is to be imposed and levied make it an annual tax payable in two instalments, but they manifestly provide for no case but that of the imposition of that annual tax at the commencement of the official year.

Here there was no legal authority whatever for its imposition at the commencement of the year. The sections as to notice enforce the construction that there is only one legal period of imposition of the tax, and at that period there was no tax legally in existence. We answer, therefore, that the levy from the plaintiff was illegal.

Appellate Jurisdiction. (a)

Regular Appeal No. 33 *of* 1869.

GO'PA'LA'YYAN..............................*Appellant.*
RA'GHUPATIA'YYAN *alias* A'YYAVA'YYAN....*Respondent.*

Suit to set aside the adoption of the 1st defendant, the alleged adopted son of plaintiff's undivided brother; to declare plaintiff's title to certain lands, and for possession. 1st defendant pleaded that the question of his adoption was res judicata and the Civil Judge so decided. Upon appeal, the High Court reversed the decision and remanded the case for decision on the merits. After trial the Civil Judge found that the fact of the adoption was satisfactorily proved and that 1st defendant had done acts as adopted son since 1833, at least. It was also argued, on plaintiff's part, that the adoption was illegal, being that of a sister's son, and the judgment of Holloway, J. in *Special Appeal No.* 139 *of* 1863 was cited. The Civil Judge decided that this applied only to the Andhra country, and that as the custom was common in the Dravida country the adoption was legal, or, if not legal, that it was too late to dispute it. The plaintiff appealed and the case was referred to a full Court. The Court decided that on the general principles of Hindu Law, as expounded by the writers of all schools, a Brahmin could not legally adopt his sister's son, but as the existence of a custom, derogating from the general law, was asserted, they directed an enquiry into the existence of the supposed custom.

The Civil Judge found that a rule of customary law did exist affirming the legality of the adoption of a sister's son by a Brahmin. Upon the question coming before the High Court the finding of the Civil Judge as to the existence of the custom was reversed and the following issue sent for determination.—"Has the conduct of the plaintiff and that of the members of his family been such as to render it inequitable for him to set up as against the present defendant the rule of law upon which he now insists?" The Judge found to the effect that there had been a long course of acquiescence by all the members of the family, the plaintiff

(a) Present :—Holloway, Ag. C. J. and Innes, J.

included, in the validity of the sonship asserted. *Held*, that this would be hardly enough, if, through the influence of that course of representation by conduct the defendant had not altered his situation so that it would be impossible to restore him to that original situation. That he had done so, and that, although the adoption was invalid and inadequate of itself to create communion, that communion had been created by the course of conduct of the plaintiff and his family, coupled with the defendant's changed situation which had resulted.

THIS was a Regular Appeal against the decision of F. S. Child, the Civil Judge of Tinnevelly, in Original Suit No. 8 of 1866.

1873. *April* 4. *R. A. No.* 33 *of* 1869.

The suit was brought to set aside the adoption of the first defendant, the alleged adopted son of plaintiff's undivided brother: to declare plaintiff's title to certain lands, and for possession. First defendant pleaded that the question of his adoption was res judicata in a former suit and the Civil Judge decided in conformity with this plea.

The High Court held (on appeal) that the question was not res judicata and remanded the suit for trial upon the merits (See III, M. H. C. R. 217). The Civil Judge having tried the case upon the merits delivered the following judgment:—

"This suit was by decree in Regular Appeal No. 62 of 1866 returned for decision on the merits.

In this case the question is whether the first defendant as the adopted son of one Appuváyyar, a member of the Teruvai branch of a wealthy Brahmin family, is entitled to retain a share of the family property.

The first defendant alleging the adoption, the burden of proof lay upon him, and 16 witnesses were examined on his side and 5 on the part of the plaintiff.

I am not going into any particulars regarding the abstract of their lengthened examination, which went on for days—it suffices to say that the fact of the adoption is as satisfactorily proved by the evidence before me as it was in that given before the Principal Sadr Amin in No. 33 of 1862, confirmed on appeal and special appeal, where the same question was tried, the son being the plaintiff in that suit and the father in the present, the said father and the

1873. April 4. R. A. No. 33 of 1869.

said son, as is proved, being all along living and acting together.

In fact the evidenee now given is even stronger than what was given before, more pains having been given to the examination of the witnesses.

As for the plaintiff's witnesses they are utterly useless for his side. They are unable to contradict the fact that the first defendant has been always acknowledged by the family and his name registered, and that acts have been done by him as the adopted son of Appuváyyar since Andu 1019 (A. D. 1833) at all events.

To get over this, the plaintiff's vakil asserts that the adoption was illegal from the beginning, being that of a sister's son; and great stress is laid on Mr. Justice Holloway's words in *Special Appeal No.* 139 *of* 1863.

In fact this suit is clearly brought to have another trial at the property, grounding the claim on the abovementioned special appeal, notwithstanding that this question oflegality of the adoption was brought forward in *Special Appeal No.* 294 *of* 1864, and in *Review Petition No.* 11 *of* 1865, which were those suits in which this question was first mooted by the son of the present plaintiff and his claim thrown out.

The decision, however, in *Special Appeal No.* 139 *of* 1863 applies only to the Andhra or Telugu country and not to the Dravida or Tamil country. That is the clear inference of the words of the judgment; and so, clearly, the Reporter understood it—See the heading of the Report.

That any other supposition would lead to the greatest injustice is shown by the fact that in this one family alone several instances have occurred in which the principle "that the adopted must be one with the mothers of whom the adopter could legally have intermarried" was never once thought of, and I have no hesitation in saying that such a principle was never heard of in modern times in the southernmost parts of India.

9th witness for the defendant, one of the family, in his cross-examination deposed that he had given his son by a second wife in adoption to one who had married his daughter by his first wife. 3rd witness on cross-examination by plaintiff, also one of the family, deposes that 4th witness, a member of another branch of this family, was adopted by his mother's brother like the 1st defendant in the present case. So also Annavayya, another of the family. This is confirmed by the 4th witness—in fact the plaintiff does not and cannot attempt to deny this; and further, these adoptions of sister's sons have been recognised by a decision of the Highest Court in the country in suits connected with property belonging to different branches of this very family. (Vide *Special Appeal No.* 59 *of* 1859.)

If it were now attempted to be declared that such adoptions were illegal in Southern India there would be only one course to pursue, viz., a similar one to that some years ago acted on in England in the matter of marriage with deceased wife's sisters, that is to pass an Act declaring all such adoptions already made to be legal, but to prohibit them in future. Otherwise the most frightful confusion would be imported into very many families in this district alone.'

I lay such stress on this as it is the only ground really relied on by the plaintiff in the present case, for that the 1st defendant was adopted some 40 years back is proved beyond a shadow of a doubt.

Therefore being of opinion that the adoption is legal and that *Special Appeal No.* 139 *of* 1863 does not apply to this case, and that even if not legal it is now too late to dispute it, I have no hesitation in dismissing the plaint with costs."

Against this decree of the Civil Judge the plaintiff appealed on the ground that the Court was wrong in law and in fact in holding—

1. That the adoption of the 1st defendant is proved.
2. That such adoption is legal, he being a sister's son.
3. That if illegal it is now too late to question it.

1873. April 4. R. A. No. 33 of 1869.

This appeal was referred to a Full Court, with *Special Appeal No.* 233 *of* 1869, in which the same question arose, and came on for hearing on the 18th February 1870, when the Court (SCOTLAND, C. J., BITTLESTON, HOLLOWAY and COLLETT, J J.) delivered the following judgment—

"The substantial question in these cases is—whether the adoption by a Brahmin of his sister's son is valid ?

On the general principles of Hindu Law as expounded by the writers of all schools, the arguments have shewn us that this question must be answered in the negative.

Several dicta and one decision of the late Supreme Court have, however, been quoted to show the existence of a custom derogating from that general law, and in one of these cases the Civil Judge of Tinnevelly, whose great experience causes us to attach great weight to his opinion, has expressed himself very strongly in favour of the existence of such a customary law. We have, therefore, resolved to direct an enquiry as to the existence of the supposed law.

At present we will only observe that

1. The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those *following it that they were acting in accordance with law,* and this conviction must be inferred from the evidence.

2. Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible, but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.

With these observations, intended to point out the direction which the enquiry should take, we refer the issue.—

Whether there exists in the districts from which these suits come, a usage so continuous, public and uniform, as to establish a rule of customary law affirming the legality of the adoption of a sister's son by a Brahmin ?

In return to this issue the Civil Judge (E. F. Webster) found (on a consideration of oral evidence alone) "that the custom has been shown to be uniform because uninterrupted. That the existence of the custom goes back as far as 134 years, and that the publicity of the acts, the general acquiescence of the people in those acts and the opinions of those among the people who are acquainted with the Shastras that such adoptions are valid, all go distinctly to show a conviction among the people that they were acting in accordance with law. And I therefore find the issue sent down in the affirmative."

1873. *April* 4. *R. A. No.* 33 *of* 1869.

After receipt of this finding the case was again argued and, on the 16th December 1872, the Court (HOLLOWAY and INNES, J J.) delivered the following

JUDGMENT:—This case was originally heard before our late colleagues Bittleston and Collett and the late Chief Justice as well as before one of ourselves. On the return to the issue it was again argued and all the Judges then present were of opinion that the customary law asserted was not made out. That there were many instances of property passing through transactions supposed to be valid adoptions there could be no doubt, but we were all of opinion that there was no evidence justifying the setting up of a rule of law opposed to all authorities, and specifically to the one declared by almost the only skilled witness examined in favor of the custom to be binding in the very district in which it was sought to enforce it. These allegations of special customs have arisen from mixing the practices of people not subject to the Hindu Law at all with the system of law binding those who are subject to the Hindu Law. In the case of adoptions this has been the more conspicuous from the assumption, originally based upon no solid foundation whatever, that the "son given" is the only son known to the present age. In the case of Brahmins it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority of the place to which they belong. These authorities themselves are as much the record of customary law as of the written texts of

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the Shastras, and we are quite satisfied that no such rule of customary law exists. Our opinion is confirmed by a case from Tranquebar, also a Southern District, in which, after an elaborate inquiry, the Civil Judge came to the conclusion that there was no such rule of law. This being so, the decree of the Civil Judge cannot be confirmed upon the grounds upon which he put it. Here, however, it is alleged that the conduct of this family has debarred them, in consequence of their acting as if such rule existed and the changed situation induced, from now taking the benefit of the ordinary rule of law and we therefore remit the case for the determination of the issue—

"Has the conduct of the plaintiff and that of the members "of his family been such as to render it now inequitable for "him to set up as against the present defendant the rule of "law upon which he now insists?"

The return of the Judge to this issue was in the affirmative, and at the final hearing, *R. Báláji Rau* appearing for the appellant and *Miller* and *Sanjiva Rau* for the respondent, the Court (Holloway, Acting C. J. and Innes, J.) delivered the following

JUDGMENT :—We decided with great reluctance that when once it was conceded that adoption is now the only mode of affiliation, the defendant was not a son of the person who purported to have affiliated him. We, however, saw reason to doubt whether a long course of conduct of the members of this family had not rendered it inequitable for the plaintiff now to insist on the invalidity. The Civil Judge's finding is merely to the effect that there has been a long course of acquiescence by all the members of the family, the plaintiff included, in the validity of the sonship asserted. Undoubtedly it is the strongest case possible of that kind. It would hardly, however, be enough, if through the influence of that course of representation by conduct, the defendant had not altered his situation so that it would be impossible to restore him to that original situation.

Here, however, the attention of the parties was pointedly called to the evidence which showed that he had aban-

doned his rights to the property in his natural family and had long rendered his services in that of his quasi adoptive father. There are many other points in the case, and although we cannot disguise from ourselves that the present is an extreme application of the doctrine of changed situation, we think that it would now be manifestly inequitable to permit the plaintiff to undo partially to his own advantage what cannot be undone so far as it has prejudiced the defendant.

1873. *April* 4. *R. A. No.* 33 *of* 1869.

The situation is the result of the conduct of the whole family of plaintiff continued through a long course of years, and we think that we cannot properly decree for the plaintiff upon the footing that the defendant is wholly unentitled to any part of the family property. On the contrary we are of opinion that although the adoption was invalid and inadequate of itself to create communion, that communion has been created by the course of conduct of the plaintiff and his family, coupled with the defendant's changed situation which has resulted. We would willingly, if possible, have made a decree putting an end to this long and discreditable litigation, but the mode in which this case has been conducted would, perhaps, on the present allegations make a partition more unfavourable to the plaintiff than it ought to be. We shall, therefore, simply dismiss the appeal, but without costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 55 of 1873.

SANTAIYA................................*Appellant.*

RA'MARA'YA.............................*Respondent.*

Plaintiff sued for confirmation of an award delivered by arbitrators appointed by agreement of parties to decide upon his claim to a share of ancestral property. Defendant objected that the award was illegal, principally upon the ground that he had cancelled his submission some time before the award was passed. The District Judge ordered the award to be filed, on the authority of *Pestonjee* v. *Maneckjee* (III, M. H. C. R. 183, affirmed 12 Moo. 112.) The defendant appealed. *Held*, that no appeal lay.

THIS was a Regular Appeal against the decision of A. C. Burnell, the Acting District Judge of Mangalore, in Original Suit No. 2 of 1872.

1873. *July* 16. *R. A. No.* 55 *of* 1873.

(a) Present:—Holloway, Ag. C. J. and Kindersley, J.

1873. July 16. R. A. No. 55 of 1873.

Plaintiff prayed, under Section 327 of the Civil Procedure Code, for confirmation of an award delivered on the 5th May 1872 by Manjeshiwar Rangappa, Kollyad Manjunathaya, U. Babu Rau and N. Shiva Rau, the arbitrators appointed by agreement of parties to decide upon the claim of plaintiff for division, awarding to plaintiff the property therein specified, as one-third share due to him from ancestral property.

The usual notice having been issued to the defendants to show cause why the award should not be filed, the 1st defendant stated the following objections :—

I. That the defendant having in time repudiated his part of the agreement empowering the arbitrators to settle the matter, their award is illegal.

II. That his mother Rukumuni Amah, who is entitled to, and is in possession of the disputed land, was not a party to the agreement in question.

III. That of the 4 arbitrators who gave the award, 3 are related to the plaintiff, and the 4th is a relative of the 1st defendant's enemy, and therefore they have unjustly passed the award through bias.

The Court of First Instance delivered the following judgment—

"This is an application under Section 327 of the Civil Procedure Code to have an award filed. One of the parties objects on three grounds :—

I. That he revoked his consent.

II. That no provision has been made for his mother and others.

III. That he has been charged with the realization of debts due to the estate and payment of the other parties' share before realization.

It appears that the award was made by four out of five arbitrators who are throughly experienced vakils and merchants, and that the submission to the award of the majority is voluntary and good. Nothing has been put in to show

that counter-petitioner revoked his assent, nor, if it were proved, do I consider that such an act would be a sufficient cause for refusing to file this award, as in an analogous case where the submission was made through a Civil Court, this was held not to be a sufficient cause (*Pestonjee* v. *Maneckjee*, III, M. H. C. R. 183).

1873. July 16. R. A. No. 55 of 1873.

As regards the other two causes alleged, I am of opinion that I am not competent to consider the form of the award, or to entertain an appeal on details, but to consider only causes which invalidate the award. I have (as agreed to by counter-petitioner) not examined any witnesses.

I accordingly order, under Section 327 of the Civil Procedure Code, that this award be filed and that it may be enforced accordingly."

Defendant appealed on the following grounds:—

1. The defendant was competent to revoke the authority of the arbitrators, and he did so before they made their award.

2. The award is null and void, as the authority of the arbitrators to adjudicate on the matter referred to them without the intervention of the Court ceased from the moment of such revocation, and the decision of the High Court in III, M. H. C. R. 183, does not apply to the case.

3. The defendant cited the respondent and other witnesses to prove the revocation, but was unable to examine them, the Civil Judge having ruled that such revocation would be no bar to the award being filed.

4. One out of the five arbitrators took no part whatever in the proceedings of the others.

5. The arbitrators exceeded their jurisdiction in debiting against the defendant the outstanding debts of the family which are irrecoverable.

Bashyam Iyengar for the appellant, the 1st defendant.

V. Sanjiva Rau for the respondent, the plaintiff.

The Court delivered the following judgment:—

HOLLOWAY, Ag. C. J.—The point here urged in appeal does not arise, for there was no evidence before the Lower Court that there had been any attempt to withdraw.

1873. July 16. R. A. No. 55 of 1873.

If there had, however, and simply upon the ground that the appellant did not like his agreement, and such withdrawal was allowed to defeat a completed award, this curious consequence would follow ;—

No man can withdraw from his contract to submit, and that contract can be filed despite this objection while the arbitration is going on. If, however, the matter proceeds to its natural and legally compellable conclusion, a matter which would be wholly ineffective to stay any part of the proceeding at any stage of its progress, is adequate to destroy it when all the stages have been passed and the goal reached.

It would be very difficult to persuade me that an argument so logically self-destructive can be sustained. The quotation of English cases and rules on this matter is mere waste of time. The doctrine as stated (III, M. H. C. R. 183, affirmed, 12 Moo. 112) is the very opposite of the English in the mode in which the contract is to operate. There is clearly no appeal in this case and the application must be dismissed with costs.

KINDERSLEY, J.—I agree.

Appellate Jurisdiction. (a)

Regular Appeal No. 56 of 1873.

SAMI CHETTI.................................*Appellant.*

AMMANI ACHY and 30 others...........*Respondents.*

Plaintiff alleged that, his father having died while he was a young child, during his minority his father's widows (defendants 1, 2 and 3) aliened the whole of the estate, in portions, to different people at different times. He, therefore, brought this suit against all the alienees to recover the estate as a whole. The District Judge dismissed the suit on the ground of mis-joinder of causes of action. Upon appeal, *Held* that the Judge was wrong. That plaintiff's cause of action, the right, was his relation to the family to which the property appertained and on this right, if established, and if he be not otherwise barred, he would be entitled to recover. The fact that various persons, during his minority, affected to purchase portions of the property did not destroy the unity of his ground of action.

1873. July 23. R. A. No. 56 of 1873.

THIS was a Regular Appeal against the decision of J. H. Nelson, the Acting Civil Judge of Tranquebar, in Original Suit No. 17 of 1871.

(a) Present :—Holloway, Acting C. J. and Innes, J.

This was a suit for possession of an estate.

1873. July 23. R. A. No. 56 of 1873.

The plaintiff's case was that his father died seventeen years before suit brought, when the plaintiff was yet a young child, and that during his minority the first three defendants, his father's widows, aliened the whole of the estate, bit by bit, and by several alienations, to the defendants from 4 to 31, both inclusive. The plaintiff therefore sought to procure the annulling the several alienations made, and to get possession of the estate as a whole.

The following is taken from the judgment of the Court of First Instance :—" The 31st defendant appeared and stated that he had satisfied the plaintiff's claim as against himself : this was admitted to be true : and satisfaction was entered up accordingly.

The 30th defendant pleaded in limine that the suit was bad for mis-joinder of causes of action and of persons, with reference to Section 8 of the Code of Civil Procedure, and as such must be dismissed.

An issue relating to this point was framed, and upon the plaintiff failing to give a satisfactory reason for joining all the defendants in one suit, I decided that the suit must be dismissed.

Section 8 of the Code of Civil Procedure, which was framed upon a consideration of the English practice obtaining with reference to the joinder of several causes of action, makes it necessary that the causes to be joined shall be causes by and against the same parties, whereas in the present case, assuming the statements in the plaint to be true, the causes against the several defendants are quite separate and distinct. Defendant A, who bought part of the estate at one time, can be in no way interested in an alienation of another part of the estate made in favor of defendant B solely, at another time, and vice versâ. The evidence against defendant A will not at all affect defendant B, and vice versâ. Defendant A may have to pay the value of mesne profits accruing in respect of one parcel of land, whilst defendant B may have to pay the value of mesne profits accruing in respect of another parcel of land. And so with regard to

1873. July 23. R. A. No. 56 of 1873.

various other causes of action, there is really no connection or interdependence whatever between the several defendants. It is as if the plaintiff were to charge the defendants jointly before a Criminal Court with several trespasses, on the ground that although the trespasses were in deed separate and distinct, yet the body and property affected by the trespasses belonged to him solely, and to none other.

The decisions in *Rajah Ram Tewary* v. *Lachman Prasad*, (F. B.,) 12 W. R., 478; *Munshi Maniraddin Ahmed* v. *Baboo Ram Chand*, 2. B. L. R., A. C., 341, *Cazi Muzhur Hossein* v. *Dinobundoo Son*, Bourke 8; *Sooloo Singh* v. *Rajender Saha*, 8 Suth. W. R, 364; and other cases, appear to show beyond the possibility of doubt that a suit like the present will not lie in India any more than it will in England, and I therefore consider that I must dismiss the suit with all costs, except as against the 31st defendant.

The plaintiff appealed on the ground that—The Civil Judge was wrong in having dismissed the suit on the ground of mis-joinder of different causes of action against different parties.

Bhashyam Iyengar for *Gurumurti Ayyar*, for the appellant.

The Court delivered the following judgments :—

HOLLOWAY, AG. C. J. :—This suit has been dismissed upon the favorite ground of mis-joinder. No practitioner of this Court would have thought of making the objection as such suits are of daily occurrence.

The Judge says that the cause of action against each of the purchasers is a distinct one. The plaintiff claims his share of family property. His cause of action, the right, is his relation to the family to which the property appertains, and on this right, if established, and if he is not otherwise barred from recovering, he will be entitled to that share wherever found. The fact that various persons during his minority have affected to purchase parcels of the property does not destroy the unity of his ground of action. It will lie upon those who so purchased, upon the establishment of

his right, to shew that the sales which they set up are binding upon him. There appears no objection whatever to the frame of the suit. The decree will be reversed and the case remanded for decision.

1873. July 23. R. A. No. 56 of 1873.

INNES, J:—I agree that there is no objection whatever on the frame of the suit. See as to this, *the Commissioners of Sewers of the city of London v. Glasse* (*Epping Forest case*) reported in 41 L. J. CHY. p. 409.

Appellate Jurisdiction. (a)

Regular Appeal No. 80 *of* 1873.

JANAKI AMMA'L..*Appellant.*
KA'MALATHAMMA'L.....................................*Respondent.*

In a former suit the present defendant sued as owner by right of inheritance to recover the property of her deceased husband, and the present plaintiff resisted that suit on the ground of her preferable right to inherit. Having failed in that suit, plaintiff brought the present suit to recover half the property on the basis of a family agreement made between her and the present defendant's deceased husband. This agreement was designedly suppressed at the period of the former suit. *Held*, that the suit should be dismissed. That plaintiff in the present suit insisted upon a valid family compact varying the ordinary rules of inheritance, having, however, previously appealed to that general rule and designedly kept back the compact upon which she now sought to insist. That there could be no stronger case of an absolute waiver of that contract and of conduct rendering it wholly inequitable to permit her now to insist upon it.

Semble, where a defendant has been sued by a plaintiff upon his right of ownership, plaintiff's recovery negatives all grounds of defence to that action then existent and within the plaintiff's knowledge.

THIS was a Regular Appeal against the decision of E. B. Foord, the District Judge of Chingleput, in Original Suit No. 22 of 1872.

1873. August 6. R. A. No. 80 of 1873.

The plaint stated that plaintiff's late husband, Arumuga Mudali, and defendant's late husband, Kumarasámi Mudali, were brothers that 9 days after the death of Arumuga, in accordance with an arrangement made by the relatives of the family, plaintiff and Kumarasámi jointly executed an agreement (A) on plain paper, dated 13th April 1859, which was subsequently engrossed on a stamp paper (B) on

(a) Present:—Holloway, Ag. C. J. and Innes, J.

1873. August 6. R. A. No. 80 of 1873.

the 25th idem, in which it was agreed that if Kumarasámi died without male issue, the family property should be divided equally between plaintiff and defendant, and that Kumarasámi having died without male issue in 1865, the plaintiff sued to recover a moiety of the said property valued at Rupees 2,567-2-7.

The defendant pleaded that the plaintiff was estopped from bringing this suit in opposition to the pleas raised by her in Suit No. 143 of 1867, District Munsif's file (*Appeal No.* 83 *of* 1870 this Court's file, and *Special Appeal No.* 41 *of* 1872, High Court's file), in which the agreements now sued on were not produced; that the said agreements were forged; and that Kumarasámi 5 or 6 days before his death, which occurred on the 18th March 1865, made a nuncupative Will, to the effect that defendant should enjoy the family property, adopt a son, and maintain the plaintiff.

The District Judge delivered the following judgment:—
"The due execution of agreements A and B, has, in my opinion, been proved beyond a doubt by the plaintiff's witnesses. I do not believe the improbable statements of defendant's witnesses regarding the alleged nuncupative Will with authority to adopt, which they say was made by Kumarasámi 5 or 6 days before his death, in the presence of plaintiff, who acquiesced therein. I think it most unlikely that after executing A and B and depositing them (as is proved by plaintiff's witnesses) with one of the arbitrators, Kumarasámi should have taken no steps to revoke them by means of another document, more especially as defendant's 3rd witness said that he (Kumarasámi) was able to settle accounts with him at the time in question.

Although there can, in my opinion, be no doubt that plaintiff's defence in Suit No. 143 of 1867 was false, and that she ought to have based her defence on A and B, I think she ought not, on that ground alone, to be debarred from recovering the property she is entitled to, under the terms of those agreements. That she acted so under legal advice seems certain, for her 12th witness who was her pleader in the former suit says that the agreements were then shown to him, and that *he* advised their non-produc-

tion, because she had pleaded division and adoption. It seems therefore neither just nor reasonable that she should be deprived of her right, because, acting under bad advice, she made a false defence in the former suit between the parties.

1873. August 6. R. A. No. 85 of 1873.

The result is that I adjudge that defendant do put plaintiff in possession of the property claimed in the plaint, but, under the circumstances of the case, I think each party should bear her own costs."

The defendant appealed on the following grounds among others :—

I. The plaintiff is estopped from bringing this suit.

2. Her claim in this suit is in opposition to the pleas raised by her in Suit No. 143 of 1867 of Carungooly District Munsif's Court, Appeal Suit No. 83 of 1870 of the Civil Court of Chingleput, Special Appeal Suit No. 141 of 1872 of the High Court.

Gould (with him *Rungiah Nayudu*) for the appellant (having stated the facts)—We sued in 1867 and defendant was then bound to set out all her title. We recovered in that suit. What title did defendant then put forward ? First, that the brothers were divided, and secondly that her husband gave her authority to adopt. She cannot now come forward with this new case on the agreements, having designedly suppressed them in the former suit.

He referred to the judgment of Holloway, J. in the *Shivaganga case* (II, M. H. C. R.)

[HOLLOWAY, J. referred to the passage at page 144—" There is no question here as to the technicalities flowing from the nature of the English action of ejectment. The decree could be arrived at only by affirming all matters necessary to the proof of the plaintiff's title, and by negativing all matters, perhaps whether pleaded or not, which would enable the defendant to resist such a decree. It is unnecessary, however, in justification of my judgment, to push the proposition so far."]

1873. August 6. R. A. No. 80 of 1873.

Ráma Rau for the respondent, referred to *Hunter* v. *Stewart*.

[HOLLOWAY, J.—See my explanation of that case in III, M. H. C. R. That case depended on a peculiarity of Bills in Equity.]

In the new Evidence Act only two sorts of estoppel are mentioned (Secs. 115, 116, 117) and I submit that this case does not fall under either.

The following judgment was delivered by

HOLLOWAY, Ag. C. J.—In a former suit the present defendant sued as owner by right of inheritance to recover the property of her deceased husband and the present plaintiff resisted that suit on the ground of her preferable right to inherit. Having failed in that suit, present plaintiff sues to recover half the property on the basis of a family agreement made between her and the present defendant's deceased husband. It is part of the case that this agreement was designedly suppressed at the period of the former suit.

In this case, therefore, the question suggested at II, M. H. C. R. 144, arises directly for solution.

Where a defendant has been sued by a plaintiff upon his right of ownership, does the plaintiff's recovery negative all grounds of defence to that action then existent and within the plaintiff's knowledge ?

An affirmative answer to that question will probably be found to be the correct one, both on principle and authority, when regard is had to the difference of the action from the English one, and to the fact that no English authority on this matter can be precisely in point.

It is unnecessary, however, to discuss this point at large, for there is another perfectly satisfactory ground for saying that this suit cannot be maintained.

The plaintiff now insists upon a valid family compact varying the ordinary rules of inheritance. She has, however, previously appealed to that general rule, litigated the matter through three Courts, designedly keeping back the compact

upon which she now seeks to insist. There can be no stronger case of an absolute waiver of that contract and of conduct rendering it wholly inequitable to permit her now to insist upon it.

1873. August 6. R. A. No. 80 of 1873.

The original suit must be dismissed; there will be no costs throughout.

Appellate Jurisdiction. (a)

Regular Appeal No 140 *of* 1872.

NA'RA'YANASA'MI MUDALI and 7 others...*Appellants.*
KUMARASA'MI GURUKKAL..................*Respondent.*

Plaintiff sued to establish his right to the dharmakartaship and to the hereditary office of Pooja Stanika in a pagoda. He alleged that he held the office of Pooja Stanika hereditarily, and that dharmakartaship was assigned to him by the original dharmakartas by deed (No. I) but that he was afterwards forcibly dispossessed by defendants. Defendants denied plaintiff's hereditary right to the office of Pooja Stanika and declared that he was removed from the dharmakartaship for neglecting his duties and that they were appointed instead (by Document No. IV). The District Judge gave judgment in favour of plaintiff. The defendants appealed. An issue was sent to the Lower Court, whether, assuming Exhibit I to be revocable, did the persons who executed Exhibit IV constitute the collective body entitled to revoke it. The Lower Court found this issue in the negative. *Held,* (by the High Court) that this was not properly a suit for a declaration. The object of the suit and the effect of the declaration would have been to put the plaintiff in possession of that from which he had been ousted. That as to the claim to the dharmakartaship, Document I showed that the plaintiff was a mere appointee as agent and that, as the authority given by it was not revoked by IV, the case was that of one ousted from a possession which he held upon a good title by those who had shown none. That on the principle of such cases as *Asher* v. *Whitlock,* the plaintiff had a right to the restoration of that possession.

THIS was a Regular Appeal against the decision of E. B. Foord, the District Judge of Chingleput, in Original Suit No. 4 of 1871.

1873. July 23. R.A. No. 140 of 1872.

The plaintiff sued to establish his right to the dharmakartaship and to the hereditary office of "Pooja Stanika" in the pagoda of Mookteswarar at Conjeveram, together with arrears of income.

The plaint alleged that the plaintiff held the office of "Pooja Stanika" hereditarily, and dharmakartaship was

(a) Present:—Holloway, Ag. C. J. and Innes J.

1873. July 23. R. A. No. 140 of 1872.

assigned to plaintiff by certain washermen who were the original dharmakartas, by means of a deed executed in his favor on the 28th December 1858 (marked No. I) which assignment was also confirmed by means of a deed dated 20th December 1869 (A), but that a suit having been brought by plaintiff in the District Munsif's Court against one Mutu Mooniappah Mudaly who had usurped some of the pagoda lands, the 2nd defendant, on pretence of arbitrating in the matter, persuaded plaintiff to hand over to him deed No. I and Inam title deed No. II, and afterwards, in collusion with 1st defendant and others took, forcibly, possession of the pagoda on the 20th September 1870.

The defendants denied plaintiff's hereditary right to the office of "Pooja Stanika," and pleaded that he was removed from the dharmakartaship by the washermen for neglecting his duties and allowing the pagoda to fall into bad repair, and that the plaintiff of his own accord returned deed No. I and title deed No. II to the said washermen, who handed them over to defendants together with fresh deeds of assignment (Nos. III. and IV). The defendants further disputed the correctness of plaintiff's valuation of the shops belonging to the pagoda and the income attached to the Pooja Stanikaship.

The documents filed by the parties were—for plaintiff.

A. Deed executed by Muniyappa Maistry and 27 other washermen of Conjeveram in favor of Kumarasamy Gurukkal on 20th December 1869.

For defendants—

I. Deed executed by Palani Maistry and other washermen in favor of Kumarasamy Gurukkal on 16th Margali of the year Kalayukti (28th December 1858).

II. Title deed granted by the Inam Commissioner to "the manager for the time being of the pagoda of Mukteswarar" on 14th January 1862.

III. Deed of transfer of dharmakartaship of the Shri. Mukteswara Swami Pagoda executed by Varadan and other

washermen of Conjeveram in favor of Kuppan Chetty and three others on 25th July 1870.

1873. July 23. R. A. No. 140 of 1872.

IV. Deed executed by Muniyappa Maistry and seven others in favor of V. Rangasami Mudali and six others on 9th December 1869.

The following issues were framed,

Whether plaintiff is entitled to the dharmakartaship and pooja stanikaship in question.

Whether the plaintiff's valuation of shops belonging to the pagoda and of the income attached to the pooja stanikaship is correct.

The District Judge delivered the following judgment.—

" Both parties rely on Exhibits I and II.

Plaintiff admits that III and IV are genuine, but denies their validity. The due execution of A is clearly proved by the attesting witnesses and the writer (2nd, 3rd and 4th witnesses for plaintiff) and by the statement of defendant's 5th witness, one of the executants. I think the evidence of the plaintiff and his 2nd, 6th and 7th witnesses as to the manner in which 2nd defendant got possession of Exhibits I and II entitled to more credit than that of defendant's 3rd, 4th, 5th and 6th witnesses. The three latter are some of the washermen who executed Exhibits I, III and IV, and the 5th admits having signed A.

It is alleged by defendants and stated by their 4th, 5th and 6th witnesses, that plaintiff was removed from the dharmakartaship by the washermen for neglecting the duties and repairs of the pagoda, but this is entirely refuted by the express terms of A, by which the efficient manner in which plaintiff performed his trust is most distinctly acknowledged. I think, therefore, that nothing passed to the defendants under III and IV.

Plaintiff's hereditary right to the pooja stanikaship is proved by his 2nd, 4th and 5th witnesses.

My finding on the 1st issue is, therefore, in plaintiff's favor,

1873. July 23. R.A. No. 140 of 1872.

As regards the 2nd issue, I find the shops in question to be worth rupees 700, and that the annual income attached to the pooja stanikaship is rupees 120.

I therefore adjudge that plaintiff's right to the dharmakartaship and "Pooja Stanikaship" is established, and that the defendants do put plaintiff in possession of the pagoda in dispute together with the shops belonging thereto, and do pay him the income attached to the Pooja stanikaship at the rate of rupees 120 per annum from the date he was dispossessed, that is 20th September 1870, to date of execution of this decree, with interest thereon at 6 per cent per annum, and costs."

Defendants appealed on the following grounds, among others :—

The decree is against the weight of evidence.

No. I and A have been misconstrued. They do not give the plaintiff any permanent right to the dharmakartaship.

Such right even if it existed has been forfeited by the plaintiff in consequence of his negligence in looking after the affairs of the pagoda.

Such right even if it existed has also been forfeited by the plaintiff in consequence of his having voluntarily returned and given back documents Nos. 1 and 2.

The plaintiff having brought the suit for a declaration of his right only to the dharmakartaship in question, the Lower Court was not justified in decreeing the possession of the disputed property to the Plaintiff.

At the first hearing of the appeal, on February 21st 1873, the Court (MORGAN, C. J. and INNES, J.) referred the following issue—Assuming exhibit I to be revocable, did the persons who executed exhibit IV constitute the collective body entitled to revoke it ?

The finding of the District Judge was that exhibit IV was not executed by persons constituting the collective body entitled to revoke exhibit I.

1873. July 23. R. A. No. 140 of 1872.

The case then came on for hearing before HOLLOWAY, Ag. C. J. and INNES, J.

Miller and *Sanjiva Rau*, for the appellants, the defendants.

Johnstone for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT :— It was manifest that this was not properly a suit for a declaration. The object of the suit and the effect of the declaration would have been to put the plaintiff in possession of that from which he had been ousted. The case has, therefore, been treated by us and argued upon the question of whether there is a right to possession.

As to the claim to the Dharmakartaship, Document I shews that the plaintiff was a mere appointee as agent. If it professed to transfer rights of trusteeship, it would be invalid as Document IV is also invalid. It has not been attempted to contest the finding of the District Judge that IV did not revoke the authority given by No. I.

The case before us, therefore, is that of one who has been ousted from a possession which he held upon a good title by those who have shown none. On the principle of such cases as *Asher* v. *Whitlock*, L. R. 1 Q. B. 1, the plaintiff has a right to the restoration of that possession. With the unfounded claims on both sides there ought to be no costs.

Original Appellate Jurisdiction, (a)

Appeal No. 11 *of* 1873.

COMMUNDUN MOHIDEEN SAIB............*Appellant.*

OREE MEERAH SAIB......................*Respondent.*

In a suit by indorsee against the maker of a Promissory Note payable on demand the defence was there were dealings in skins between the defendant and the payee, and an agreement was made by which the payee was to pay the defendant Rs. 4,500 as an advance upon goods to be supplied by the defendant to the payee ; that the money was paid and the Promissory Note sued on was made and delivered as an acknowledgment of the receipt of the money and as a security for what should be due to the maker in respect of the dealings. The defendant stated that the state of the accounts between him and the maker showed a balance in favour of the defendant, and notice to the plaintiff of these facts was alleged. The note was indorsed to the plaintiff two years and eleven months after date. *Held*, that although the evidence failed to make out notice to the plaintiff, the note when endorsed was an overdue note, and that the plaintiff took it subject to the then state of the accounts between the payee and the defendant.

(a) Present :—Innes and Kernan, J J.

1873.
August 15.
A. No. 11.
of 1873.

THIS was an Appeal from the decree of the Honorable Mr. Justice Holloway, made in Suit No. 544 of 1872.

The relief sought in the plaint was payment by the defendant to the plaintiff of the sum of Rupees six thousand one hundred and ninety-six, and Annas eight, being the amount of principal and balance of interest due (as per underwritten particulars by the defendant to the plaintiff) upon and in respect of a Promissory Note in the Tamil language and character made and executed by the defendant (at Madras) in favor of one Seevaram Mahomed Gani Saib for Rupees 4,500, bearing date the tenth day of September 1869 (and payable on demand), which said Promissory Note was endorsed over by the said Seevaram Mahomed Gani Saib to the plaintiff for valuable consideration.

The plaintiff claimed further interest on the said principal sum of Rupees four thousand and five hundred from the twelfth day of August 1872 up to the date of payment at eighteen per cent. per annum.

The subject of the claim was as follows :—

On the tenth day of September 1869 the defendant borrowed and received from the said Seevaram Mahomed Gani Saib the sum of Rupees 4,500 and executed a Promissory Note sued on.

The defendant agreed to pay interest on the said sum of Rupees 4,500 at the rate of eighteen per cent. per annum, and did in fact pay interest at such rate to the said Seevaram Mahomed Gani Saib for the space of ten months.

Particulars of Plaintiff's claim.

10th Sept. 1869, to amount of defendant's Promissory Note of this date...	4,500	0	0
12th August 1872, to interest thereon to this day at 18 per cent. per annum.	2,371	8	0
Rupees...	6,871	8	0
Do. to amount of interest paid by defendant to Seeveram Mahomed Gani Saib	675	0	0
Balance due, Rupees...	6,196	8	0

The defendant, Commundun Mohideen Saib, filed the following written statement. "The defendant states that the Promissory Note sued on was made by him in favor of the said Mahomed Gani Saib, with whom the defendant had dealings.

In the year Sookala, the said Mahomed Gani Saib and the defendant agreed to deal with each other in skins and hides, and it was arranged and agreed between them that the defendant should supply the said Mahomed Gani Saib with skins and hides from time to time, and as, and when, he the said Mahomed Gani Saib might require the same; and that the said Mahomed Gani Saib should pay to the defendant the sum of Rupees 4,500 to be held by him in deposit as security for repayment to himself of such monies as might at any time remain due to him on account for value of such skins and hides as he should from time to time supply to the said Mahomed Gani Saib and interest thereon in case the said Mahomed Gani Saib should fail to pay for same otherwise.

On the twenty-seventh day of Avani of the said year Sookala, corresponding with the tenth day of September 1869, the said Mahomed Gani Saib did, in pursuance of the terms of such arrangement, pay to the defendant the said sum of Rupees 4,500 to be held by him in deposit as security as aforesaid, and as an acknowledgment of the receipt of such deposit, the defendant made the Promissory Note sued on in favour of the said Mahomed Gani Saib.

After the making of such Promissory Note, the defendant had large dealings and transactions with the said Mahomed Gani Saib under terms of the said arrangement, which dealings and transactions continued down to and until the month of December 1870, when the accounts in respect of such dealings were settled by and between the said Mahomed Gani Saib and the defendant, whereupon, after giving the said Mahomed Gani Saib credit for the amount of the said Promissory Note and interest thereon up to date of such settlement, a balance of Rupees one thousand, nine hundred and sixty-eight, annas two and pice six, was found to

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be due by the said Mahomed Gani Saib to the defendant up to the fourth December 1870.

At such settlement of accounts between the defendant and the said Mahomed Gani Saib, the plaintiff was present, and the defendant in the presence of the plaintiff and others then there present asked the said Mahomed Gani Saib to return to him his said note, (being the note sued on) whereupon the said Mahomed Gani Saib in the presence of the plaintiff stated that such note was at Vaniembady; and that he the said Mahomed Gani Saib would return same to him in a few days on his return from Vaniembady, it being then his intention to go to Vaniembady.

The defendant submits that the plaintiff is not entitled to recover from him the amount of the said note or any part thereof for the reasons above set forth :—

"On the fifteenth day of August 1872, the defendant, through his attorneys, called upon the said Mahomed Gani Saib for payment of the sum of Rupees two thousand, three hundred and sixty-nine, annas ten and pice five, being amount of principal and interest due up to date on foot of such settlement of account and for the delivery up to the defendant of the Promissory Note sued on, but the said Mahomed Gani Saib has taken no notice of such demand.

The sum of Rupees two thousand, four hundred and thirty-eight, annas eight and pice eight is due by the said Mahomed Gani Saib to the defendant for principal and interest due by him to the defendant up to date, on foot of the said settlement of account of the fourth December 1870."

The following issue was settled—whether the note was taken in circumstances which discharged the defendant from liability to pay to plaintiff?

At the final hearing, judgment was given for the plaintiff with costs.

The defendant appealed upon the following ground :—

That the said decree is against the weight of evidence inasmuch as the learned Judge ought to have held that the

plaintiff took the Promissory Note sued on under circumstances which discharged the defendant from liability to pay the plaintiff.

Johnstone for the appellant, the defendant.

Miller for the respondent, the plaintiff.

The Court delivered the following judgments :—

INNES, J.—The case in the Court below turned on the question whether the note was taken by the plaintiff in circumstances which discharged the defendant from liability to pay the plaintiff; and it appears that the circumstances insisted on by defendant were that plaintiff had full notice of the payee having been discharged. The note was given by defendant to Gani for 4,500 Rupees advanced. Gani's accounts are not before the Court, nor are the accounts of defendant substantially impeached, and they must be taken, as between plaintiff and defendant, to show accurately the state of the accounts between Gani and defendant. These accounts show that there were mutual dealings between the parties, subsequent to the making of the note, which in the end turned the account in favor of defendant. Defendant says there was a settlement of account at the close of the dealings, at which plaintiff was present. That it was found that Gani was indebted to defendant, and that the note ought to be delivered up. That Gani promised to deliver it up, but deferred doing so, and at length endorsed to plaintiff.

The learned Judge before whom the case was tried was not satisfied that the plaintiff had notice, and it would appear from Counsel's note that he expressed himself as regarding the evidence to the alleged settlement with suspicion.

If I were able to hold that there had been a settlement and discharge, I should hold on the authority of *Bartrum* v. *Caddy*, 9 Ad. & E. 275, that this was a good defence as against an indorsee, though for value and without notice. There is no written record of the settlement, and I am not satisfied from the evidence that any settlement took place. It appears very improbable that a person should have taken the

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note who not only had full notice that it was discharged (as he must have had if the statements of the defendant's witnesses as to the settlement are true), but who besides had received this notice of the discharge of the note before so many people (one of whom was defendant) that he could have no chance of suppressing the fact. Defendant and Gani are represented by the evidence as having looked over defendant's accounts and agreed upon the result as showing a balance against Gani. A final settlement of accounts would hardly be undertaken in so casual haphazard a way. One would expect that Gani would at the settlement have produced his accounts, or a memo. of them, and compared them with those of defendant. The accounts would ordinarily be signed with a memo. of the settlement and its result, and it is especially unlikely that, with the note still in Gani's hands, and in form negotiable, defendant would have been satisfied with the mere verbal admission of Gani that there was nothing due upon it. Yet no memo. was taken from Gani of the state of the account, nor was he required to give an acknowledgment of the discharge of the note. The casual presence of witnesses living at Guriattam, a considerable distance from Madras is, to say the least, suspicious, while the fact that no persons of the neighbourhood should be called in to witness the settlement is certainly not in favor of the truth of the evidence. Then the conduct of defendant in taking no active steps to recover the note from Gani, with whom it appears from defendant's evidence that he was at that very time engaged in litigation, is very much against the truth of the statement and evidence to the effect that Gani promised to return the note at once. I therefore disbelieve the evidence to the settlement. The other circumstances are not sufficient of themselves to warrant the inference of fact that the note was discharged and that plaintiff had notice of the discharge.

There is however the further contention that the note was overdue. The indorsee of an overdue note takes it subject to all the equities with which it may be incumbered. But not to claims arising out of collateral matters, as a set

off. A bill or note payable on a specified date, or after a specified time, is mature when the date or time arrives, and if subsequently endorsed is endorsed overdue. But this is a note payable on demand, and the question is when such notes are to be treated as overdue. Such an instrument has two purposes of existence, one to secure the reimbursement of the payee by the maker, the other the negotiation of it by the payee. One or other of these purposes is intended ordinarily to be fulfilled without unreasonable delay. But what is to be considered unreasonable delay must necessarily vary with the varying local circumstances in which notes on demand are ordinarily given. Accordingly the cases in England and America show a great variation in the decisions as to unreasonable delay. In some cases there has been evidence of demand for payment having been made, and this has been held in England to be an indication of the lapse of a reasonable time, and the note subsequently negotiated has been regarded as overdue.

In *Brooks* v. *Mitchell* and *Barough* v. *White* it was noticed that there was no evidence of demand for payment, and that they could not, therefore, be put upon the footing of those cases in which evidence of a demand had been held sufficient to warrant the Court in treating the note as overdue. From these and other cases the rule has in England been deduced that before a note on demand can be treated as overdue in the hands of an endorsee there must be some evidence of a demand.

Now it is the defendant's case, and his accounts support his assertions, that the account had turned in his favour. This being so, I find it difficult to believe Gani's statement that he made a demand for what both parties must well have known was not due. I cannot, therefore, in support of the view that the note was overdue, make use of the evidence to a demand having been made. If I were at liberty to follow the American cases, I should hold that the lengt of time, 2 years and 11 months, during which the note was in Gani's hands without negotiation was sufficient, without any evidence of demand for payment, to show that the note was overdue.

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But it appears to me that evidence of a partial discharge is stronger evidence of a note's being overdue than demand of payment can be, and this there is no doubt we have in this case. For the evidence shows that as goods were supplied, the value of such goods was to be taken in discharge *pro tanto* of the advance represented by the note, and that goods were accordingly supplied.

I think, therefore, that the note ought to be treated as having been overdue at the date of endorsement, and then the extent of the obligation on the note, as between Gani and defendant, would depend on the value of goods short supplied by defendant within the amount due on the advance. If, therefore, as defendant asserts and his account shows, the account had turned against Gani and the note was an acknowledgment of an amount which was in fact no longer due, it would be a fraud in Gani to negotiate the note, and the indorsee taking it overdue stands in the place of Gani as regards the right of defendant to restrict the obligation on the note to the amount due, if any, on the account. I would therefore reverse the decree and direct the taking of the account.

KERNAN, J.—My view of this appeal is that it should be allowed, and, if the plaintiff so desires, an account should be taken between the defendant and M. Gani Saib of their dealings, and that the bill should only be a security in plaintiff's hand for any debt due by the defendant to Gani Saib.

The bill I look upon as being received by the plaintiff after it was overdue, and therefore it is in plaintiff's hands subject to the equities between defendant and Gani Saib, that is to the result of the accounts.

The following facts appear to me to be established beyond doubt. That Gani wished to purchase goods from defendant and the latter required an advance before he would supply, and it was agreed that defendant should pay interest on the advance which, however, was to be put to the credit of the goods when sold. Then it was agreed that the note now sued on was to be given to represent that

advance, and accordingly the advance was made to defendant on the 10th day of September 1869, and a note given payable on demand, and dated that day. The learned Judge below appears to have believed that the note was so given to represent the advance, and that the advance was to be put to credit of the goods.

If Gani Saib's evidence, as printed, means, at line 266 "gave *note* for advance on account of goods and it is entered in accounts" and again at line 277 "the 4,500 is entered in Moideen's accounts. I saw that entry, never saw other entries," then the agreement is clear, as the defendant and Gani both agree on that point. But if Gani's evidence does not contain an admission of the agreement, see the concurrence of undoubted facts going to establish it.

1. The dealings commenced in September 1869. (Not the supply of goods however.)

2. The advance and note are of that date.

3. Interest was paid in cash on the note until the supply of goods by defendant was begun, but no interest was paid after the first supply.

4. Defendant's accounts are filed with his statement, and in these accounts, the 4,500 is credited to Gani at the date of the advances, also the interest to the date of the 1st supply of goods and the goods supplied are entered apparently in correct order.

These books are not impeached in any way—and though Gani said he kept books, in which the note is entered, and though Gani disputes defendant's accounts, yet Gani's books are not produced.

Plaintiff was quite aware from the defence filed that one main question in the case made by the defendant was, that the note was by the agreement of Gani and defendant to be taken into the account of the goods, and yet the books of Gani, so important, are not produced.

I am, therefore, quite satisfied that by the agreement between Gani and the defendant, the note and the considera-

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tion for it were to be taken into the accounts of goods, and that the agreement was that if, on the taking of the accounts, and crediting the 4,500, nothing should be due to Gani, or a less sum than the amount of it, the liability on the bill was to be governed by the result.

This was an equity attaching to the bill itself, as between the original parties, and *not a collateral matter* such as a set-off, and any endorsee of this note taking it, when overdue, took it subject to the equities even though he gave full value for it.

Cullinridge v. *Farquharson*, 1 Stark. 259.

Sturtovant v. *Ford*, 4 Man. & G. 101.

Holmes v. *Kidd*, 3 H. & N. Exr. Cham. 891.

Burrough v. *Moss*, 10 B. & C. 558.

The question then is—was this note overdue when plaintiff took it. It is a note payable on *demand* without any mention of interest, and is capable of being sued on, at once, without demand made, and the Statute of Limitation runs from its date.

Norton v. *Ellam*, 2 M. and W. 461.

No doubt this note was intended as a continuing security by the parties (though not so expressed on the face of it) and so comes within the principle that such a note is not to be considered overdue until payment has been demanded.

Barough v. *White*, 4 B. & C. 327.

Brooks v. *Mitchell*, 9 M. & W. 15.

In *Barough* v. *White*, an endorser sued on the note, *no demand* was proved before endorsement, and it was held *therefore* that the note could not be treated as overdue.

In *Brooks* v. *Mitchell* likewise a note on demand was endorsed and in the hands of the endorser, but no evidence was given of demand before endorsement, and it was held *therefore* not to have been overdue, when the endorsee took it.

In *Croffs* v. *Davis*.—There was no proof of *demand* before endorsement.

I take it therefore that a demand of payment of a note payable on demand and non-payment make such note thereafter overdue. It has not been held in any case cited, or that I am aware of that notice of such demand must have been communicated to the endorsee before or at the time of endorsement in order to place him in the position of taking or holding it overdue.

In *Brockman* v. *Caddy*, 4 A & E. 275 (1838) Lord Denman said, that "it *usually* appeared on the face of the note that it was overdue," and Patteson, J. put the question "Surely the plaintiff must be fixed with the knowledge that the note had been presented so as to be overdue?"

But there was no discussion on the point in that case, and the dictum or query by Patteson, J. was but *obiter dictum* which has never been adopted or followed, and a marked difference is to be observed in the language used by Lord Denman and Patteson, J.

Then, assuming that my view of the law on this point is right, the further question is whether the note was overdue before the endorsement to the plaintiff. On this point Gani states that he asked Mohideen for the money often. This is clear evidence of a demand of the note—and again Gani says he endorsed the note over as he wanted money. Is not the inference from this statement clear that he had demanded the amount, and that as defendant did not pay it Gani transferred it, and if this is to be believed the note was clearly overdue when plaintiff took it. I have no doubt upon the evidence, that the note was on the evidence of the plaintiff overdue at the date of the endorsement. Upon this view I would allow the appeal and modify the decree as above stated.

But the defendant alleged that plaintiff had actual notice that Gani and defendant had dealings together, and that the note and the amount of it had been brought into the accounts between them and that plaintiff was present at a settlement of accounts between them, in which a balance of about 2,000 was found due to defendant by Gani who then and there promised in plaintiff's presence to give up

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the note to defendant. If I had heard the case originally I should probably have, upon the evidence as it appears reported, found for the defendant. For although the plaintiff and Gani deny the settlement, and though no settlement has been signed by Gani, yet the accounts of the defendant, which appear correctly kept, are produced and support the allegation that the balance was due to the defendant of Rs. 2,000 odd at the date when the dealings ended; and no accounts of Gani of the dealings with defendant are produced, though he says he has them and that the amount of the note is not brought into them and though the balance in them is against defendant, and plaintiff was aware of the importance of producing them. Moreover, a settlement of accounts at which plaintiff was present, though not stated to have taken an active part in it, and though Gani's books or accounts were not produced, is proved by four different persons, apparently independent of plaintiff. These persons did not, as far as I can see, give their evidence with such a degree of particularity as to dates or sums as to give the idea that the evidence was concocted. Then Keshava Pillay (in defendant's employ no doubt) proved defendant's accounts, shewing an exact balance due to defendant, and these accounts were brought into Court on the 4th November 1872 and do not bear any appearance of fabrication. Again, Gani says a balance was due to him, and he did not sue for two years, though he wanted money. However, I am not prepared to say that the learned Judge is wrong in the conclusion he came to, viz., that there was not any settlement of accounts, and that plaintiff had not any actual notice before he became endorsee that the amount of the note was brought into the account and a balance found due to defendant, and that plaintiff had promised to return the note to the defendant.

There still remains the question whether plaintiff is a mere name-lender suing for the benefit of Gani. On this question I entertain an extremely strong opinion in the affirmative. The evidence tends, I think, to lead irresistibly to that conclusion. It appears that the note should be barred by the Statute of Limitations, on the 11th September 1872,

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and that plaintiff became endorsee thereof in August 1872 upon a contract between him and Gani, whereby the latter *sold* the bill, and as he says in his evidence, "I remained indifferent as I sold the note," that is the plaintiff agreed not to look to Gani for payment,—and plaintiff taking the responsibility of defendant alone gives for the note not only the full principal amount of the note but also all arrears of interest at 15 *per cent* for 2½ years or so, less 450 Rs. This appears to me simply incredible. It does not appear that plaintiff had any special knowledge of the circumstances or solvency of defendant. On the contrary the note was 2½ years and upwards unpaid, *with interest* at 15 per cent. Yet plaintiff does not take the responsibility of the endorser, Gani! Plaintiff says that defendant told him two months, before that he gave the note and would pay in 10 months and there was some conversation about getting 1,000 Rs. taken off the note. I doubt this, but even so, it is clear notice to plaintiff that defendant was pressed, and I cannot believe that plaintiff ever gave the money for the note *bonâ fide*. I believe he is a mere name lender, and in this view I would also modify the decree as above.

Appeal allowed.

Appellate Jurisdiction. (a)

Referred Case No. 58 *of* 1873.

VENCATACHELLA MUDALI *against* T. SASHAGHERRY RAU.

The Limitation Act (IX of 1871) does not give a new period of limitation to a suit on a bond which was barred by the old Limitation Act (XIV of 1859) before the new Limitation Act came into force.

1874. *January* 5. *R. C. No.* 58 *of* 1873.

THIS was a Case Referred for the opinion of the High Court by A. Narâyana Iyengar, the District Munsif of Chittoor, in Suit No. 477 of 1873.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The Limitation Act (IX of 1871) does not give a new period of limitation to a suit on a bond which was barred by the old Limitation Act (XIV of 1859) before the new Limitation Act came into force.

(a) Present:—Morgan, C. J. and Holloway, J.

Appellate Jurisdiction. (a)

Matrimonial Case No. 3 of 1873.

DEVASAGA'YAM PITCHAMATHOO ... ... *Petitioner.*
NAIYAGAM.... ... ... *Respondent.*
THULUCKANAM. ... ... *Co-respondent.*

Suit for a divorce on the ground of adultery. The marriage took place in 1860, the adultery commenced almost simultaneously with the marriage. The relief was sought in 1872. *Held*, that as until 1869 there was no means of obtaining relief, the question was whether the delay since that time had been sufficiently accounted for. Petitioner's excuse was that he believed that after seven years he could contract a second marriage. *Held* : also that the delay ought not to be construed into an insensibility to the injury sustained, as the other circumstances of the case rebutted the existence of indifference approaching to connivance.

1874. *January* 20. *Mat. C. No.* 3. *of* 1873.

CASE Referred under Section 17 Act IV of 1869 by R. Davidson, the District Judge of Trichinopoly, for confirmation of the decree in Original Suit No. 38 of 1872, declaring the marriage of the Petitioner with the respondent to be dissolved subject to confirmation by this Court.

No Counsel were instructed.

This case coming on for hearing, the Court delivered the following judgment :—

HOLLOWAY, J. :—The adultery commenced almost simultaneously with the marriage and has accompanied it throughout its course. The marriage took place in 1860 and in 1872 the relief is sought.

The facts are clear enough, and, if the remedy had existed in 1860, the delay itself ought probably to prevent the divorce being granted. Until 1869, however, there was no means of obtaining such relief, and the question is whether the delay since that time has been sufficiently accounted for. Petitioner's excuse is that he believed that after seven years he could contract a second marriage. After much fluctuation of opinion, I think that the delay in this case ought not to be construed into an insensibility to the injury sustained.

The other circumstances of the case rebut the existence of indifference approaching to connivance (*Bellew* v. *Bellew and Tollemache*, 1 Sw. and Tr. 553.) I would therefore affirm the decree.

INNES, J.—I agree and would affirm the decree.

KINDERSLEY, J.—I concur.

(a) Present :—Holloway, Innes and Kindersley, J. J. J.

Original Appellate Jurisdiction. (a)

Appeal No. 26 *of* 1873.

PARAM SHOOK DOSS..............................*Appellant.*

RASHEED OOD DOWLAH BAHADOOR and 2 others.............................. } *Respondents.*

A Mahomedan debtor was arrested within the original jurisdiction of the High Court on a Sunday. Upon application made, INNES, J. directed his discharge on the grouud that the arrest, having been made upon a Sunday, was illegal. Upon Appeal, *Held*, by HOLLOWAY, J. that the provisions of the Lord's Day Act (XXIX Car. 2, c. 7) do not apply in this country. That even if the substantive provisions of the Statute were applicable, it did not follow that Section 6 would be. That if the Statute dealt with substantive law it would be applicable to all the Queen's subjects or none, and that there were ample reasons for saying it was impossible to apply it to all. By KERNAN, J. that, as between natives of India, the Lord's Day Act does not apply.

1874. *January* 15. *A. No.* 26 *of* 1873.

THIS was an Appeal against the order of the Honorable Mr. Justice Innes, dated 12th May 1873, directing the discharge of a Mahomedan debtor from arrest on the ground that the arrest, having been made on a Sunday, was illegal.

Johnstone, for the appellant, the plaintiff.

Miller, for the respondents, the defendants.

The Court delivered the following judgments :—

HOLLOWAY, J.—The question is whether a Mahomedan debtor is entitled to his discharge on account of the illegality of arrest upon a Sunday.

The question depends upon the applicability or otherwise of the Lord's Day Act (XXIX Car. 2, c. 7) within the original jurisdiction.

As that Statute was in force at the period of the settlement its application is possible, and the question must be determined by subjecting its matter to the principle which governs.

That principle is that such of the laws apply as passed before the settlement *of a colony and are applicable to its condition*, and whole classes of Statutes have always been excluded by the exception (Sir W. Grant in *Att. Genl.* v. *Stewart*, 2 Mer. 143; *Daws* v. *Painter*, Freeman 175: Dwarris on Statutes, 527).

(a) Present :—Holloway, and Kernan, J J.

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The applicability is to be determined by the Court of the settlement subject to the appeal in such case provided. The fact that a great majority of the Queen's subjects would be amenable to the penal provisions of the Act on every Monday morning for not attending Church under 3 Jas. I. c., 4, for selling goods, working at their ordinary callings, employing boats or barges, will probably satisfy most minds that such a Statute is manifestly inapplicable.

If, however, the substantive provisions of this Statute were applicable it does not follow that this Section 6 would be. The mode of execution of a judgment is exclusively determined by the Court of Process. (Bar. 117, Wharton ... 838, *Dela Vega* v. *Vianna,* 1 B. & Ad. 284, overruling *Melan* v. *Fitzjames,* 1 Bos. & Pul. 138, *Heath, J.* dissenting).

The English law of process never was the law of this Court. The old Charters authorize the making of rules for the Government of such matters, and a general rule of the late Supreme Court made the practice of the Queen's Bench the law of the Court so far as the same was applicable. Since the Civil Procedure Code, there cannot be even a pretence of the applicability of that process, and there is not a word in that Code to justify the exemption here set up. The decision of this Court that such arrests are not illegal in the Mofussil concludes the question, if I am right either in the assumption that this is a pure rule of procedure, or in the assumption that the whole Statute, if taken together as substantive law, is wholly inapplicable. If the construction were adopted that the Statute confers a personal privilege upon the English debtor, which he is to take with him wherever he goes, the present debtor would not be within the provision. It seems to me impossible to sustain such a position and equally so to sustain the argument that the prohibition applies to the Sheriff. If the Statute deals with substantive law it is applicable to all the Queen's subjects or none.

There are ample reasons for saying that it is impossible to apply it to all. The conclusion seems to me obvious. I would reverse the order.

1874. January 15. A. No. 26 of 1873.

KERNAN, J.—As between natives of India, the Lord's Day Act XXIX, C. 2, in my judgment, does not apply.

Whether different provisions of the English Law, Common and Statute, apply to India, has been the subject of consideration and judgment in many cases. In addition to those cited by Mr. Justice Holloway, see *Mayor of Lyons* v. *E. I. Co.*, I Moore's P. C. [illegible] and cases there cited. Also Perry's Oriental Cases, p. 75.

The general principle referred to by Mr. Justice Holloway of the introduction of the law of the mother country into foreign possessions acquired by conquest or cession beyond doubt applies to India, but subject to the qualification he mentions. See cases ante, especially *Freeman* v. *Fairlie*, 1. Moore's I. A. C. Qy. 305. That qualification has been expressed in various ways. Blackstone, Brown's Com. p. 119. "Provisions of English Law neither necessary nor "convenient for the newly settled region, are not in force." See *Att. Genl.* v. *Stewart*, referred to by Mr. Justice Holloway, and *Freeman* v. *Fairlie* ante.

Besides the above view, it may be added that the policy of the Lord's Day Act seems wholly inapplicable to a country not Christian. In *the Mayor of Lyons* v. *E. I. Co.* Lord Brougham states, p. 271-2 that Sir W. Grant, in "*Att. Genl.* v. *Stewart* held that the Mortmain Act did not apply to the Colonies upon the ground that it had its origin in a policy peculiarly adapted to the circumstances of the mother country."

Now it has been already pointed out how manifestly inconvenient the introduction of the Lord's Day Act would be into India, as between natives, and how unsuited to their circumstances. Then is there any *necessity* for holding that Sec. 6 applies to this country, though the rest of the Act does not? I cannot see that there is, especially as the one policy runs through the Act, and that policy cannot be carried out in its entirety. But again, to use Lord Brougham's words, "the Act had its origin in a policy pecularly adapted to the circumstances of the mother country," and it is I think wholly inapplicable here, as between natives.

1874. January 15. A. No. 26 of 1873.

For these reasons I agree that the order appealed from should be reversed.

Under the Charter, the Court might frame rules for the Execution of Process and possibly might order that no process should be executed on Sunday, but no such order has been made.

Order reverced.

Appellate Jurisdiction. (a)

Referred Case No. 37 *of* 1873.

MOLAKATALLA NAGANNA, ... *Plaintiff.*

PEDDA NARAPPA.,.. ... ... *Defendant.*

Where a suit was brought in June 1873 for a balance due on a bond dated 29th January 1868, payable on demand, the plaintiff alleging a demand for the balance in February 1873, less than 3 years before suit brought.—*Held*, that, as the writing was made in 1868, and, by the law then in operation, payment could not be enforced by suit after three years from that time, the new law in such a case conferred no right of suit founded upon a demand subsequently made. The repeel of the former Act could not affect the legal bar which had previously arisen.

1873. November 24. R. C. No. 37 of 1869.

THIS was a Case Referred for the opinion of the High Court, under Section 22, Act XI of 1865, by P. Subba Rau, District Munsif of Gooty, in Suit No. 164 of 1873.

The suit was brought for the recovery of Rs. 49, being balance, after deducting part payments, due on a bond dated 29th January 1868, payable on demand, executed by the defendant in plaintiff's favor for Rs. 100, the plaintiff alleging that a demand for payment of the balance was made in February 1873. Though three years had elapsed since the execution of the bond it was urged that a demand had been made within three years preceding the presentation of the plaint. The suit was instituted on the 7th June 1873 and the case came on for hearing (ex parte) on the 3rd July 1873, when judgment was reserved subject to the decision of the High Court upon the following case:—" Section 4 of the new Limitation Act IX of 1871 provides that every suit instituted after the period of limitation prescribed therefor by the second schedule thereto annexed, shall be dismissed, although limitation has not been set up as a defence. Under clause (*a*) to Section 1, the Act applies to suits instituted

(*a*) Present :—Morgan, C. J., and Kindersley, J.

after the 1st April 1873. No. 58 of the second schedule provides a period of three years from the date of demand for agreements for money payable on demand. In the present suit, the part payments alleged by plaintiff have not been endorsed on the bond by the defendant or his agent as required by Section 21 of the Act. The plaintiff's witnesses depose that five months previously the plaintiff asked the defendant for the balance due, and that the defendant promised to pay if the plaintiff waited for two months more. Three years had elapsed when the alleged demand was made. The law in force at the time of the execution of the bond limited the period within which a suit could be brought upon it to three years from its date. Although Act IX of 1871 does not appear to be applicable to bonds executed before it came into operation, and applies only to suits instituted after it came into operation, I am of opinion that a suit on a bond payable on demand cannot be admitted, unless there was a demand made within the time limited by the law in force at the date of execution of such bond, and unless the suit is commenced within the time prescribed by Act IX of 1871, computed from the date of such demand. The questions submitted for decision by the High Court are:—

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I. Under the above circumstances can this suit be proceeded with to judgment?

II. Is a suit on a bond admissible, whatever the bond's age may be, if such bond provides for payment on demand, and a demand within three years preceding the institution of the suit be alleged and proved?

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The writing is for the payment of 100 Rupees, of which a portion (51 Rupees) has been paid and the balance (49 Rupees) is now sued for. The nature of the suit assumes that the whole debt had accrued due at some former time and had been in part paid before the demand for this balance. If the new law is applicable, and the time of limitation is to be computed from the time of demand, it is immaterial when the *balance* was demanded. It must be

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ascertained when the debt (of 100 Rupees) became due and was demanded, and the computation must be from this period. But the writing, having been made in January 1868 for money payable on demand, by the law then in operation could not be enforced by suit after three years from that time. The new Act in such a case confers no right of suit founded upon a demand subsequently made. The repeal of the former Act could not affect the legal bar which had previously arisen.

We think in the present case the suit is barred.

Appellate Jurisdiction. (a)

Special Appeal No. 324 *of* 1873.

VASUDEVA SHANBHAGA and another...*Special Appellants.*
KULEADI NARNAPAI and 10 others...*Special Respondents.*

A suit brought against a number of alienees of a deceased member of an undivided family, for the recovery of family property illegally alienated by him, is not such a suit as ought to be dismissed on the ground of multifariousness. It is most desirable that the whole of the alienations should be at once before the Court called upon to decide the question, in order to secure the soundness of the particular decision and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same.

1874 January 22. S.A. Nos. 324, & 634 of 1873.

THIS was a Special Appeal against the decision of A. C. Burnell, the Acting Civil Judge of Mangalore, in Regular Appeal No. 327 of 1872, confirming the decree of the Court of the Additional Principal Sadr Amin of Mangalore in Original Suit No. 64 of 1870.

Plaintiffs, the special appellants in *Special Appeal No.* 324 *of* 1873, were the sons of one Naraina Shanbhaga. They stated in their plaint that the whole of the property described in the plaint was acquired by their paternal grandfather, Vasudeva Shanbhaga; that long after the death of their grandfather their father died on the 26th March 1867; that they succeeded to, and have since been enjoying the property left by their father, with the exception of that in the possession of the defendants who have been enjoying the same under alienations made by their

(a) Present:—Morgan, C. J., Holloway, Innes and Kindersley, J. JJ.

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father; and that the said alienations being valid only to the extent of his own share, they have brought this suit to cancel the alienations to the extent of their shares and to recover their two-thirds of the family property.

The 1st defendant pleaded, among other pleas, that the suit should be dismissed for multifariousness, and an issue was framed as to whether the suit was sustainable in law. The following is taken from the judgment of the Court of First Instance :—

"I think the suit unsustainable because different causes of actions have been joined against several defendants. Although the suit is designated by the plaintiffs as one for partition, it is not in fact one for partition, as its real object is to cancel alienations made by their father and recover the property from strangers. None of the members of the plaintiffs' family are included as defendants or are alleged to enjoy any of the family property. Plaintiffs admit that their father having died, they have since been enjoying whatever property their father left behind. None of the defendants have ever denied the plaintiffs' right to succeed their father, or recover their share of the property, should the alienations be held invalid. They have, on the contrary, indirectly and tacitly admitted the plaintiffs' right of succession, so that different causes of action have been joined in this suit against different parties where each of these parties has a distinct and separate interest. The suit may be sustainable if the defendants deny the plaintiffs' right to recover the share claimed by them. But the present suit is clearly brought against several defendants for causes of actions which have accrued against each of them separately and in respect of which they are not jointly concerned, which is illegal. See note to Section 8 of the Code of Civil Procedure by Broughton."

The plaintiffs appealed, and the District Judge confirmed the decision of the Principal Sadr Amin. Plaintiffs then preferred a special appeal.

A. Rámachandrayar, for the special appellants, the plaintiffs.

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Ráma Rau for the 9th and 10th special respondents, the 10th and 11th defendants.

Special Appeal No. 634 *of* 1873.

CUTTI OODAIYAN.........Special Appellant.

CANAGAPPA OODAIYAN and 21 others..............} *Special Respondents.*

THIS was a Special Appeal against the decision of G. Muttuswamy Chettiar, Subordinate Judge of North Tanjore, in Regular Appeals Nos. 258, 259, 260 and 273 of 1872, reversing the decree of the Court of the District Munsif of Tranquebar in Original Suit No. 82 of 1871.

The suit was brought on similar grounds to the former one (*S. A. No.* 324 of 1873) to set aside alleged illegal alienations of family property made to different persons. The Munsif went fully into the merits of the case and decreed, as to most of the property claimed, in favour of the plaintiff. The Subordinate Judge, however, dismissed the suit on the ground of multifariousness. The plaintiff appealed specially.

Gurumurti Aiyar, for the special appellant, the plaintiff.

Ananda Charlu for the 2nd, 3rd, 5th to 15th and 17th to 22nd special respondents, 2nd, 3rd, 5th to 15th and 17th to 22nd Defendants.

In these cases the High Court delivered the following JUDGMENTS :—

In S. A. No. 324 *of* 1873.—This is a suit for a share of family property and is brought against alienees of one member deceased. It has been dismissed by the two Courts below on the ground of multifariousness.

We are unanimous in thinking that these decrees should be reversed and the suit remitted for decision on the merits.

The question mainly at issue will probably be whether the alienations were made with the assent of the other members, or for such family necessity as would suffice to supply the absence of that assent.

It is manifest that the number and nature of the alienations are no unimportant elements for the determination of their propriety. It is most desirable that the whole of them should be at once before the Court called upon to decide the question in order to secure the soundness of the particular decision and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same.

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In our opinion a discretion as to procedure has here been exercised in a manner not to the advantage of substantial justice.

The costs hitherto incurred in all the Courts will be provided for in the Subordinate Judge's revised decree.

In S. A. No. 634 *of* 1873.—In the case from North Tanjore there is less difficulty in reversing the decree; for the Subordinate Judge has, in a similar case, dismissed the suit upon appeal after a full decision upon the merits in the Original Court.

The decree of the Lower Appellate Court will be reversed and the appeals remanded for investigation on the merits. The costs in this and the Lower Appellate Court will be provided for in the revised decree.

Special Appeals allowed.

Appellate Jurisdiction. (a)

Referred Case No. 24 *of* 1873.

EATHAMUKALA SUBBAMMAH.... ... ... *Plaintiff.*

RAGIAH.... ... ... *Defendant.*

Suit brought on 24th April 1873 for principal and interest due on a bond dated 30th October 1850. The debt was payable by 8 annual instalments on failure of any one of which the whole amount was to be payable on demand. No instalment was paid and when the suit was brought defendant pleaded that the suit was barred as three years had elapsed from the date on which the last instalment became due.

Held that the usual clause, that on failure to pay one instalment the whole amount shall be payable on demand, gave a mere election to plaintiff of converting the obligation into a different one. That that election was never exercised, and that the document continued one securing the payment of a debt by instalments as to all of which the action had long been barred. That it was unnecessary, therefore, to consider whether, in the present case, "on demand" must not be construed according to its meaning at the period at which the words were written.

(a) Present :—Holloway, Ag. C. J. and Innes, J.

1873. July 2. R. C. No. 24 of 1873.

THIS was a Case Referred for the opinion of the High Court by K. Kristnasami Rau, the District Munsif of Kavali, in Suit No. 211 of 1873.

The following is taken from the Munsif's statement of the case.

" This is a suit brought for the recovery of Rupees 50, being principal and interest due under a bond executed on the 30th October 1850 to the plaintiff's late husband by the defendant's father (now deceased.)

'The defendant pleads that the plaintiff's claim is barred by lapse of time. The suit was instituted on the 24th April 1873. The bond sued on runs in these terms :—' Bond executed to Vencata Ramireddi by Ramanatham Ayyappah on the 10th day of Asweeja Bahula in the year Sadarana (30th October 1850). On a settlement of accounts I have found myself indebted to you in the sum of Rupees 30. I have agreed to discharge this amount *by* 8 *annual instalments* which shall fall due in the full moon of Ashada in (*Here follow the dates*). The first 7 instalments shall consist of each Rupees 4 and the last instalment of Rupees 2. I shall pay the amounts of the said instalments without fail. But if I fail I shall pay you *on demand* the whole amount due with interest at one per cent per Rupees 120 per mensem from this date.'

'It is admitted that no payments were made by the defendant or his father. The plaintiff avers that she demanded the payment of the debt on the 10th January 1873. Defendant denies this demand.

'The plaintiff's Vakil argues that, as far as his client is concerned, the debt sued for is one payable on demand; that the first demand was made on the defendant on the 10th January 1873; and as this suit was instituted within three years from the date of the demand his client's claim is not barred. The defendant's Vakil contends that on the failure of the obligor to pay the instalments when they became due, the Act began to run against the plaintiff's claim, and that, as three years have elapsed since the date of even the last of the

instalments, his client is entitled to a decree on the plea of limitation. 1873. July 2. R.C. No. 24 of 1873.

'The decision of the point raised in this suit mainly depends upon the right construction of the suit bond. In my opinion, it evidences two distinct obligations :—1st, the discharge of the debt by certain specified instalments; 2nd, the payment of it to the creditor on demand." Construing the document thus, the Munsif held that the instalments not having been paid the debt sued for was one payable on demand, and that the suit was governed by the provisions of Art. 58 of the 2nd Schedule of Act IX of 1871.

The question submitted for the decision of the High Court was—What is the proper provision of the Indian Limitation Act IX of 1871 applicable to the present case?

The following judgment was delivered by

HOLLOWAY, Ag. C. J.—The construction of the document is sufficient to show that the Munsif's opinion is wrong. The document, dated 1850, is a document securing money lent and providing for its payment by instalments. There is the usual clause that, on failure to pay one instalment, the whole amount shall be payable on demand. This gave a mere election to plaintiff by his act of converting the obligation into a different one. On the statement of this case that election was never exercised, and it continues a document securing the payment of a debt by instalments as to all of which the action has long been barred.

It is unnecessary, therefore, to consider in the present case whether "on demand" must not be construed according to its meaning at the period at which the words were written.

The attempt has arisen out of the unfortunate change in the new Limitation Act. The legislature has no doubt followed the opinion of Mr. Austin (p. 484 *et. seq*. Vol. 1.)

That learned writer declares that in case of this and similar obligations no action can be brought until demand according to the doctrines of the Roman law. It is

1873. July 2. R. C. No. 24 of 1873.

however admitted, even by Romanists who maintain the doctrine, that it has no support in the texts of the Roman law, and the highest authorities are opposed to admitting its reasonableness on principle [Sav. V. 295. Vang. I. 226 (See Dig. 45, 1, 48 de V. O.)].

Mr. Austin's reasons are founded upon two misapprehensions the old mistake that the action only exists when the demandee has committed an infraction of right—the other that there is a connection between *mora* and the birth of the action (See. Sav. V. 295. p. 1.) He was no doubt struck with the fact that every man in England is allowed without necessity to drag his opponent into Court, although he would have paid without compulsion, and inflict a heavy penalty on him by way of costs. This monstrous iniquity, however, is no essential part of the doctrine. A man's right is protected by the action at the moment of its arising. It may well be, however, that he, who needlessly drags his opponent to Court, ought in justice not only not receive costs but ought to pay them. This is a question altogether apart from the one under discussion. I cannot, therefore, but lament that this legislative novelty, opposed to the opinion of nearly all great lawyers, has been introduced.

Innes, J.—I agree in the opinion of the Acting Chief Justice as to the construction of the document.

Appellate Jurisdiction. (a)

Referred Case No. 53 of 1873.

Stri Seshathri Ayyengar............*Plaintiff.*

Sankara Ayen..............................*Defendant.*

Under the provisions of Section 49 of Act VIII of 1871 an unregistered bond, though immovable property be made by the terms of it collateral security, is admissible in evidence in a suit to enforce the personal liability of the person executing the bond. It is only excluded where it is offered as evidence of a transaction affecting immovable property.

1873. November 24. R. C. No. 53 of 1873.

THIS was a case referred for the opinion of the High Court by J. Wallace, the Acting Judge of the Court of Small Causes at Madura, in Suit No. 1182 of 1873.

(a) Present :—Morgan, C. J. and Holloway, J.

1873. November 24. R. C. No. 53 of 1873.

The following was the case as stated :—

" The plaintiff sues to recover Rupees 218-5-8 due upon a bond dated the 10th of October 1869. The defendant objected to the bond being received in evidence on the ground that it was not registered, whereas, inasmuch as immovable property was made by the terms of its collateral security, it ought to have been registered, and he cited High Court Reports, Volume IV, page 178. I was of opinion that the present Act (VIII of 1871) by the 3rd Clause of Section 49, operates to exclude such evidence, where a right to such immovable property is in dispute, but that where, as in the present case, it is sought to make the deed merely evidence of the obligation, the objection was not valid.

The following is a translation of the document :—" Deed of hypothecation dated 10th October 1869, executed to M. R. R. Ponnoosamy Thever Avergal, son of M. R. R. Sivaga Thever Avergal of Poodoovayal, residing at Ramnad within the jurisdiction of the Sub-Registrar of Ramnad in the Madura District, by Sunkara Ayer, son of Rangasawmy Sastry residing at Darasunum Pathanandel within the jurisdiction of the Sub-Registrar of Ramnad in the Madura District. I have borrowed Rupees 150, pledging my Kendy Punjah, being a spot of land consisting of 3 kurucums of Valacodappoo Punjah situated on the east of Sundasamien's Punjah, on the south of the road leading to Pappacoody, on the west of Kearay Punjah of Ramasamien and on the north of the road running from east to west attached to my Kearay lands in the said village. As I have received this sum of one hundred and fifty Rupees, before Ragaviengar from the Treasury of Poonandy, I bind myself to repay the sum with interest at 1 per cent. within 30th July 1870."

[*Here follow the signatures.*]

The question for the decision of the High Court is

Is the bond in this case admissible as evidence of the obligation created by it ?

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—The question referred for the decision of the High Court is whether the bond in the above suit is

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admissible as evidence of the obligation created by it? Looking at the language of Section 49 of Act VIII of 1871, we are of opinion that the bond, though an unregistered instrument, should be received in evidence for the purpose mentioned, in a suit to enforce the personal liability of the person executing the bond. It is only excluded where it is offered as evidence of a transaction affecting immovable property.

Appellate Jurisdiction. (a)

Referred Case No. 52 *of* 1873.

C. VENCATARAMANIER..........................*Plaintiff.*

MANCHE REDDY..........................*Defendant.*

Suit brought in August 1873 on a bond, payable on demand, dated July 1868. Payment had been demanded on three occasions—May 1871, September 1872 and May 1873. *Held*, that by the law in force at the time of execution of the document, the action was born in July 1868 and by the new as well as by the old law became barred in July 1871. The rule of the old as of the new law is that the time, having once begun to run, cannot be stopped. That the demand in 1871 could have no effect, for it was neither by the old nor the new law a mode of giving a new point of departure.

1874. January 24. R. C. No. 52 of 1873.

THIS was a case referred for the opinion of the High Court by A. Ghendriah, the District Munsif of Palamanair in Suit No. 215 of 1873.

The following was the case as stated—

The suit was brought to recover Rupees 32, amount of principal and interest due on a bond executed by defendant in favour of plaintiff on the 26th July 1868, for Rupees 20. The bond provides for repayment of the amount on demand with interest at one per cent. thereon. The plaint was filed on the 4th August 1873. Plaintiff's vakil adduced oral evidence to shew that plaintiff made repeated demands for payment during the last 3 years. That on every occasion defendant promised payment, and that the last demand and promise of payment was made four months ago.

Plaintiff's vakil argued that the cause of action in this suit must be considered to have commenced from the date of last demand, made four months ago, and he relies on Note 58 to Schedule II of the new Limitation Act IX of 1871. I

(a) Present :—Morgan, C. J., and Holloway, J.

am unable to agree in this view. On the date of the bond sued on, the Law of Limitation in force was Act XIV of 1859. The bond falls under Clause 10, Section 1 of Act XIV of 1859. In the absence of a subsequent written acknowledgment under Section 4 of Act XIV of 1859 the prescribed period of limitation of three years should be reckoned from the 26th July 1868, the date of the bond, and this period expired on the 26th July 1871. The question arising is whether the Note No. 58 in Schedule II of the new Limitation Act is applicable to this bond?

In reply to an inquiry by the High Court, the Munsif returned the finding—That the 1st demand for payment was made in May 1871; the 2nd demand one year before 29th September 1873, and the 3rd and last demand four months before the 18th September 1873.

The following is a translation of the bond:—

"Bond executed to Kodur Vencataramanappah Guru of Chadum village by Machi Reddi, son of Chelakapati Runga Reddi, living in Palepalle in Japti Chilakapadu, on 7th Sravana Sudha of Vibhiva. (26th July 1868.)

"The sum of Rupees 20 which I borrowed of you on account of my exigency, and which has been found to be due against me on a personal adjustment of accounts, in the matter of previous accounts and bonds, and interest thereon at 1 per cent. per mensem, I shall pay whenever you demand and shall obtain back my bond. Thus of my own accord I have caused this bond to be written by the karnam of Chadun and have delivered it."

[Signed and witnessed].

No Counsel were instructed.

The judgment of the Court was delivered by

HOLLOWAY, J.—This suit was brought in 1873 upon a document executed in July 1868. Up to 1st April 1873 the rules of limitation were those of the old Act, for to say that these parts shall not be applied until 1st April 1873 is in effect to say that the Act for the purpose of limitation becomes operative on that date. By the law in force the action was born on 26th July 1868, and by the new as well as by the old law became barred on 26th July 1871. The rule of the

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old as of the new law is that the time, having once begun to run, cannot be stopped (Section 9).

The demand in 1871 can have no effect, for this is neither by the old nor the new law a mode of giving a new point of departure.

The effect of the new law when it comes into force upon obligations to pay money on demand is to cause the action to be born not at the period of the lending of the money but at the period of demand. That this mischievous crotchet is founded upon a mistake of Mr. Austin as to the Roman law and a confusion of the ideas of "*actio nata,*" and "*mora,*" I have shewn elsewhere. It seems to me quite clear that on legal principle this rule cannot have the effect, as against the plaintiff, of strangling the action already born, and as against the defendant of strangling his right to the peremptory exception which was in expectancy on 26th July 1868, and a well acquired right in July 1871, before the period at which the new Act could apply at all.

Here all the facts required to consummate the destruction of the action took place under the old law, and no lawyer doubts that in such a case the right to the exception in limitation and the real right acquired by prescription vested at the period of the new law cannot be divested by it. So to decide would be to affect acquired rights by matter subsequent (Unger I. 146 n. 77). *Leges et constitutiones futuris,* &c. C. I., 14-7, set out in Broom, Lofft and others.

If however the new Act, although not applicable to suits, could in some mysterious way be considered to have come into operation on 1st July 1871 before the period had run out, my answer would be the same.

To destroy an action and exception already born would be to violate the principle of law referred to.

To give a new starting point on account of a demand would be to do what neither the new nor the old law authorises. To stop the period of limitation by any other modes than those prescribed would be to violate the principles of all Statutes of Limitation and the express provisions of this (Section 9). I have no doubt that the suit was barred.

Appellate Jurisdiction. (a)

Regular Appeal No. 80 *of* 1872.

SHRI BROZO KISHORO PATO DEVU, adopted son of the late SHRI ADIKONDA DEVU, ZEMINDAR OF CHINNAKIMEDY, by his adoptive mother and guardian SHRI KUNDONO DEVI PATA MAHADEVI, widow of the said SHRI ADIKONDA DEVU.........*Appellant.*

SHRI VIRA SHRI VARADHI VIRAPRATAPA SHRI RAGHUNATHA ANANGA BHIMA DEVU Keshari Maharaza, Zemindar of Pratapagiri or Chinnakimedy....... .... *Respondent.*

In a suit by an adopted son to recover the property of his adoptive father the plaintiff alleged that he was adopted by the widow in pursuance of a written authority given to her by her husband, and with the consent of the sapindas of the adoptive father. There were two sapindas, one of whom consented, but the defendant, the nearest sapinda, refused his consent. The District Judge, finding against the written authority, and being of opinion that the consent given was not sufficient to render the adoption valid, dismissed the suit.

Held, on Appeal, by the High Court, that the authority was sufficiently established by the evidence.

Held also that the consent of one of the two sapindas was sufficient.

THIS was a Regular Appeal against the decision of J. G. Thompson, the Civil Judge of Berhampore in Original Suit No. 1 of 1871. 1873. *March* 13. *R. A. No.* 80 *of* 1872.

The suit was brought by the plaintiff to recover the Zemindary of Chinnakimedy and certain movable property. The plaintiff claimed as the adopted son of the late Stri Adikonda Deo, who died on the 23rd of December 1868. After his death his widow gave birth to a daughter, whereupon the Government recognised the defendant, the brother of the late Zemindar, as successor. The plaintiff alleged that he had been adopted on the 20th November 1870 by the widow in pursuance of a written authority given to her by her husband and with the consent of the relatives of the deceased.

The defendant denied that the adoption of the plaintiff was valid.

The late Zemindar left only two sapindas, the plaintiff's father and the defendant. It appeared that the plaintiff's

(a) Present :—Holloway and Kindersley, J J.

1873. March 13. R. A. No. 80 of 1872.

father consented to the adoption, but the defendant refused to give his assent to the adoption of the plaintiff. There was evidence that the defendant was willing to consent if his own son were taken in adoption.

The District Judge dismissed the suit, finding against the written authority to adopt, and being of opinion that the consent of one of the sapindas was not sufficient to render the adoption valid.

The plaintiff appealed to the High Court against this decision as being wrong in law and contrary to the weight of evidence in that :—

I. He should have found that the deceased Zemindar had given to his widow a written authority to adopt.

II. In the absence of such authority, he should have found that there was a sufficient assent by sapindas, even though the defendant had never authorised any adoption.

III. He should havo found that the defendant had consented to an adoption by the widow, and that such consent was sufficient to give validity to the present adoption.

Mayne for the appellant, the plaintiff.

Miller and *Ananda Charlu* for the respondent, the defendant.

The judgment of the Court was delivered by

Holloway, J :—Two questions have been argued. 1. Whether the Civil Judge was right in rejecting the evidence as to express authority. 2. Whether the assent of the Kimedy Rajah, the only sapinda, except the defendant, is insufficient to validate the adoption as the Judge has decided.

On the first question my impression is against the finding of the Civil Judge. I am by no means insensible to the weight of the arguments derivable from the sort of evidence adduced to the attestation and from the form of that attestation.

The substantial fact, however, remains that the Maharanee, a witness whom the Judge himself considers truthful, if believed, proves the case beyond all doubt. The Judge,

I understand, for I do not feel very confident upon the matter, seems to have arrived at the conclusion that the signature is not that of the deceased Rajah. I confess to very great distrust of this sort of comparison of signatures, even in the hands of a Chabot, where the human hand is the instrument creating the impression. Where the genuineness of a seal is in question such comparison may be and has before been applied by the Civil Judge with very great advantage. I cannot agree with Mr. Mayne's argument that it was not open to the Civil Judge to find in favor of the defendant upon grounds other than those upon which he put his case. Undoubtedly however the fact that the defendant undertook to shew how the genuine signature of the deceased came to be attached to this document is a circumstance of some weight against the conclusion of the Civil Judge, for it shows that persons well acquainted with the habits of the people did not consider the mode of attestation so improbable as the argument before us treated it. The views of the people of this country as to attestation are very peculiar, and it frequently, even in honest transactions, means no more than that the persons signing are acquainted with the truth of the matter. Then the case comes to trial and with the knowledge that in the last resort the matter will be considered on English principles, the witnesses profess to have been eye-witnesses of what they never saw. Bound to decide according to what I believe to be the truth, I should by no means consider this transaction proved false, because I come to the conclusion that those, whose signatures are attached, were not eye-witnesses. I confess my belief to be that this written authorisation was given by the deceased. The terms on which he lived for thirty-three years with his brother and the affection admittedly felt for his wife are strongly in favor of such an arrangement.

On the second point, however, I am of opinion that under the doctrine of the Ramnad case, this adoption is perfectly valid. I will only refer to that judgment, necessarily tedious from my being compelled to work out a subject with

1873. March 13. R. A. No. 30 of 1872.

which I was not acquainted. I am unable to see that the doctrine of that case is touched by the judgment of the Judicial Committee. They assent to the proposition that the question of property is wholly out of the case and only suggest that, perhaps, persons living in coparcenery might have a right to object to the introduction of another coparcener. Whether this is so or not, it has no application to the present case, in which the property is to be held in severalty and not in coparcenery.

To rule that the assent must always be insufficient unless the nearest sapinda agrees, would be to render the right altogether illusory, for that nearest sapinda is a person whose succession will be intercepted by the adoption. The meaning of the law is simply to supply the widow's supposed incapacity for action. I will suppose, merely for the sake of argument, that the purity or impurity of the intention can, on the principles of Hindu Law, have any influence, and testing the matter in that view it is impossible not to be struck by the consideration that the deceased husband, if he could have had a voice in the matter, would strenuously have objected to the succession of a man from whom he had received in a long course of years nothing but injury and insult upon the most tender point, the purity of his caste. If his presumed wish could have any influence, none can doubt what that wish would have been. As to the specific object, it cannot be doubted that the son of a man of rank and of his only near relative with whom he was on terms of friendship would have been considered appropriate.

In this point of view it would not be unimportant to see that the propriety of an adoption was admitted by the defendant himself and a reward promised (E.E.) to the man who should procure the adoption of his son. We have, therefore, both the sapindas agreeing in the propriety of the adoption, and the question is therefore narrowed to the question of whether the assent of one of them to the specific object is enough. No attempt has been made even to suggest that choice, if there was power to make it, was otherwise than wise. If regard for the husband's feelings were to have

any influence upon the choice, there would again have been obvious disrespect to his memory in the choice of the defendant's nominee, and there would be strong ground for saying that the opposition of the defendant dictated by self-interest ought not to prevail.

1873. *March* 13. *R. A. No.* 80 *of* 1872.

I have no doubt however that all these arguments from the intention of the agents are wholly beside the question in Hindu law. I have stated at great length the grounds upon which I come to this conclusion at Volume VI, p. 337 of the Reports of this Court. As that case will eventually be heard by the same tribunal as the present, I shall not repeat those arguments here.

The great lawyer whose views are there embodied was the by no means unequal adversary of Savigny.

I am unwilling to refer to a judgment for which I am responsible, but, after nine years' further consideration and examination, I continue of opinion that the judgment in the Ramnad case with many crudities and notably in its importation of questions of intention into a law upon which they have no bearing, is substantially sound, and that in all essential points it was confirmed by the Judicial Committee. I adhere to its substance, and I consider the following propositions unquestionable :—

1. The adoption by the widow with the assent of a sapinda is a substitute for the actual begetting by a sapinda.

2. That the argument from analogy is in favour of the assent of one sapinda rather than of more.

3. That his assent is not to supply a capacity for rights but a capacity for action.

4. That proximity to the deceased with respect to rights of property is wholly beside the question, and that if this were not so the rule would be entirely defeated.

5. That in the present case that capacity has been sufficiently supplied, as, in the law which this assent of sapindas has superseded, a child begotten by this assenting sapinda would have been undoubtedly legitimate.

1873. March 13. R. A. No. 80 of 1872.

An attempt was made to show that in the place from which this case comes the rule of the special Bengal treatises and not that of the general law prevails. This argument was never put forward in the Lower Court, and so far as I can see from the authorities within my reach it is wholly unfounded.

There was no argument as to the mesne profits, the amount of which was, I believe, admitted, and the decree will be, reversing that of the Court below, for the return of the Zemindary to the adopted son with mesne profits from the date of suit.

KINDERSLEY, J. :—I agree to this judgment but would disallow interest on the jewels and money.

Appellate Jurisdiction. (a)

Regular Appeals, Nos. 95 and 123 of 1872.

NALLATHAMBI BATTAR. *Appellant in No. 95.*

NELLAKUMARA PILLAI. { *Respondent in No. 95 and Appellant in No. 123.* }

NALLATHAMBI BATTAR and another......... } *Respondents in No. 123.*

The suit was brought by the trustees of certain pagodas for the recovery of six villages from the defendant, on behalf of the pagodas, and to declare a copper sunnad, purporting to be an ancient grant on which defendant based his title, a forgery. The District Judge considered that the evidence sufficiently established that the title to the villages was in the temples and not in the defendant, but he was also of opinion that as defendant had been lawfully placed in management by the Board of Revenue in 1858 he was entitled to hold the villages for life. He therefore declared plaintiff's reversionary title as trustee of the temples on the death of the defendant.

Defendant appealed from this decision as to the title and plaintiff appealed as to the part of the decree which refused him immediate possession of the property. *Held* by INNES, J. that the title to manage must reside in the pagoda if it did not reside in the defendant, that the evidence abundantly negatived the title of the defendant, and that plaintiff was entitled to possess and manage the property as trustee of the temples. Upon the question whether plaintiff was precluded from recovering during the life-time of defendant, by reason of the order of 1858,

(a) Present:—Innes and Kindersley, J J.

placing defendant in possession: *Held* that the Government could not create a valid title to more than they themselves possessed; that they had simply taken over the possession and management of the endowment and afterwards given it over to defendant; that by so doing they relieved themselves of the trust they had undertaken under Regulation VII of 1817 but did not thereby appoint defendant a manager under Regulation VII of 1817. *Held* also that the Judgment in Suit No. 17 of 1819 in which the cousin of a former manager sued him for a partition of certain villages, some of which were included in this suit and in which it was decided that the manager was manager and not owner, was a decision upon a question of public right and was receivable against the defendant.

KINDERSLEY, J. agreed generally, but doubted whether the judgment in O. S. No. 17 of 1819 was upon a matter of such general interest as to be good evidence against a stranger.

THESE were Regular Appeals against the decision of F. C. Carr, the Acting Civil Judge of Tinnevelly, in Original Suit No. 38 of 1870.

1873. *November* 10. *R. A. Nos.* 95 & 123 *of* 1872.

Ráma Rau for the appellant in No. 95 and for the 1st respondent in No. 123.

Sloan and Johnstone for the respondent in No. 95 and for the appellant in No. 123.

Nallathamby Mudaliar for the respondent in No. 95.

The Government Pleader for the 2nd respondent in No. 123.

The Court delivered the following judgments :—

INNES, J. :—This was a suit brought by the trustee of the pagodas of Nallayappen aud Kanthimathi Ammal for the recovery of six villages from the defendant on behalf of the pagodas and to declare the copper sannad purporting to be an ancient grant on which defendant based his title to be a recent forgery. There was also a prayer for mesne profits. The District Judge considered that the evidence sufficiently established that the title to the villages was in the temple and not in the defendant, but he was also of opinion that as defendant had been lawfully placed in management by the Board of Revenue he was entitled to hold the villages for life. He therefore declared plaintiff's reversionary title as trustee of the temples on the death of the defendant. In regard to the copper sannad he considered it unnecessary to determine whether or not it is a genuine

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instrument, as he was of opinion that there was nothing to show that it had ever been acted upon.

Defendant appealed from this decision as to the title, and plaintiff appealed as to the part of the decree which refused him immediate possession of the property.

It is conceded that the grant of the villages carried with it the obligation to perform certain ceremonial services in these temples. In other words it is conceded that the temples have at least a charge upon the produce of the villages for this purpose. What the plaintiff contends is that the villages appertain exclusively to the two temples, while defendant claims them subject to the aforesaid charge as an hereditary grant made to one of his ancestors and rightfully devolved on him which, though taken possession of by the Government in 1858, was restored to him in 1859. The only substantial question is whether plaintiff as warden of the temples can claim actual possession and management of the villages as the property of the temple. Taking the appeal of defendant first, we may start with the admission that the person managing in 1838 was Vendramuthu Kumarasami.

Exhibit O is the judgment in Original Suit No. 17 of 1819 in which the cousins of Vendramuthu Kumarasami Pandaram sued him for partition of eight villages of which six are those claimed in the present suit. In that case Vendramuthu Kumarasami Pandaram set up that the villages were the property of the Nallayapper pagoda, and that he was manager and not owner. It followed, if this were so, that the cousins could have no right to enforce partition. The decision was that he was not the owner. To arrive at that decision it was necessary to determine, and the Judge did determine, that the property was that of the Nallayapper pagoda, and that the defendant was merely a manager for the pagoda. The present 1st defendant was not a party to this suit, but the decision is a decision upon a public right, which is as reputation receivable in evidence against defendant, though not conclusive as evidence. In 1838 the villages were attached by the Collector as the property of the pagodas

and so held. The same person was then in management. The evidence that he was then managing as agent of 1st defendant fails entirely as the Judge has shown; and the presumption arises that he was managing on behalf of the temples, as he himself then asserted. Here then we have *primâ facie* evidence of a right of possession and management residing in the temples so far back as 1819 and up to 1838.

Then how does defendant meet this? He relies on his Sásanam (the copper grant); on his evidence to his lineal descent from the original grantor; on certain decisions of the Courts; on the recognition of his title by Government in 1858; on long possession; and certain other evidence.

The Sásanam and defendant's title as derived from it were, it is true, recognised by the Board of Revenue and the Government in 1858, but this recognition rested, as has been clearly shewn in the judgment under appeal, upon no apparent foundation. As to the judgments from 1813 to 1866 on which defendant relies, the learned Judge of the Court of First Instance has very carefully gone through them, and it is clear that the question of title as between the temples and defendant has not by any of those judgments passed into *res judicata*.

It appears to me from the evidence and the circumstances of the case that the title to manage must reside in the pagoda if it does not reside in the defendant; that the evidence abundantly negatives the title of the defendant; that there is besides evidence that the possession in 1819 and up to 1838 by Vendramuthu Kumarasami was possession on behalf of the temple; and that that possession continued from 1838 till the surrender of the villages to defendant, as they were held in the interval by the Collector on behalf of the pagoda. It is difficult to understand why the managers of the temple did not come forward earlier. Prior to 1843, we have it in evidence that there were no Dharmakurtas which would explain why there was no remonstrance on the part of the temple in 1838, but the acquiescence in 1859 in the delivery of the property to defendant leads to a suspicion that those concerned abetted defendant in 1858-59

1873. November 10. R. A. Nos. 95 & 123 of 1872.

when he asserted his title, possibly with a view to obtain a share in the sums accrued in the hands of Government during the management.

But I think, for the reasons first given, that plaintiff is the person entitled to possess and manage the property as trustee of the temples, and I would affirm the judgment on this question.

No question arises of a bar by lapse of time, for, as the District Judge says in para. 25 of his judgment, the cause of action arose in January 1859 and the suit was filed within twelve years, viz., 9th December 1870.

We now come to the appeal of plaintiff, and it is necessary to determine whether plaintiff is precluded from recovering during the life-time of defendant by reason of the order of Government in 1858, placing defendant in possession.

The District Judge considers that defendant was lawfully appointed a manager and that he cannot be ejected in his life-time, but he has given plaintiff a decree declaratory of his reversionary title on behalf of the temple. The Board of Revenue had in 1838 taken the endowment into direct management and in placing defendant in possession in 1859, they simply made over the trust to the person whom they supposed to be entitled to hereditary management. But if they *had* treated him as the person absolutely entitled this circumstance would not debar a rightful competitor from contesting the title. The Government, assuming to act within the law, could not create a valid title to more than they themselves possessed. They could not lawfully have resumed nor had they affected to resume this ancient endowment. They had simply taken over the possession and management of it, and this was all that they gave over to defendant.

By doing so they relieved themselves of the trust they had undertaken under Regulation VII of 1817, but I do not conceive that by relinquishing the possession to 1st defendant they thereby appointed him a manager under Regulation VII of 1817 as supposed by the Judge. Under the Regulation a manager can only be appointed when no private person is found competent and entitled to manage

the trust. But defendant was evidently in the view of the Government both competent and entitled, and possession was given to him not as manager appointed by Government but as the person supposed to be hereditarily entitled to manage. But if we assume for argument's sake that he was appointed manager under the provisions of Section 12 of the Regulation, that is still no bar (see Section 14) to a contest of the title with a view to the recovery of the property. The words are :—"if the suit be brought against a competitor or other private person for recovery thereof;" and if a person appointed manager sets up a title to the property he takes immediately the position of a competitor and becomes liable to restore the property if another is found to have a better title.

I think that plaintiff is entitled to be at once placed in possession and management of the property to the exclusion of defendants; I would modify the decree accordingly and order an account of mesne profits from the commencement of Fusly 1279 (1869-70) to date of decree.

KINDERSLEY, J.—I agree generally in the judgment of Mr. Justice Innes. My only doubt is whether the judgment in Original Suit No. 17 of 1819 was upon a matter of such general interest as to be good evidence against a stranger. That suit was brought by a coparcener to recover his share in what he alleged to be the family property in eight villages of which six are now in question. The answer was in effect that the property was not family property but was held in trust for the performance of certain services at the pagoda. It was decided that the property was not a family inheritance, but was held by the 1st defendant in that suit, Vendramuthu Kumarasami, in trust as an endowment of the Nallayappen pagoda. The decision appears to have been upon a family question of small interest to the villagers, and I have been unable to divest my mind of a doubt whether, with reference to the object matter of the suit, or to the incidental decision in favor of the pagoda, the judgment can be held to be upon a question of such general interest as to be good evidence against Nullatumbi Battar, who was no party to it.

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But this question has very little bearing on the determination of these appeals. It has clearly not been proved that Vendramuthu Kumarasami held the villages merely as the agent of Nallathambi Battar; and all the proceedings of his time tend to show that Vendramuthu Kumarasami held the villages ostensibly as a trustee and not as an agent.

It is quite clear from Exhibit V 3 that the Government of Madras on the 9th December 1858 ordered the villages to be restored to Nallathambi Battar, not as a trustee or manager appointed under Regulation VII of 1817, but as the person whom the Government understood to be rightfully entitled to possession as the heir of the original grantor. The Government and the Board of Revenue acted under the impression that Nallathambi Battar's title had been admitted both by the Civil Courts and by the Revenue Authorities. But it now appears that that impression was erroneous. Nallathambi Battar having come into possession only in 1858, and having entirely failed to establish his title, I think the natural presumption must prevail that the endowment belongs to the temple in which the service was to be performed. And Nallathambi Battar never having been appointed a trustee or manager under Regulation VII of 1817, I agree that he has not even a life interest. The plaintiff as the trustee of the Pagoda is therefore to be placed in immediate possession of the endowment, an account being taken as directed by Mr. Justice Innes.

I think that all the costs should be borne by Nallathambi Battar throughout.

Appellate Jurisdiction. (a)

Regular Appeal No. 131 *of* 1872.

GOPALASAWMY MUDELLY ... ... *Appellant.*

MUKKEE GOPALIER and 41 others ... *Respondents.*

Suits for the recovery of rent cannot be maintained in the Civil Courts by the landholders described in Section 3 of Madras Act VIII of 1865 unless puttahs and muchilkas have been exchanged between the landholder and the tenant as required by Section 7 of the Act, or some one of the other conditions of the Section has been complied with.

(a) Present:—Morgan, C. J., Holloway, Innes, and Kindersley, J J.

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So held by Morgan, C. J., Innes, J. and Kindersley, J. (Holloway J. dissentiente.)

But such suit may be maintained by the landholders described in Section 13 of the Act without complying with the requirements contained in Section 7.

So held by Morgan, C. J. (Kindersley, J., dissentiente.)

Held also that in cases where puttahs must be tendered, tender must be made before the expiration of the Fasli for which rent is sought to be recovered.

THIS was a Regular Appeal against the decision of E. F. Eliott, the Civil Judge of Salem, in Original Suit No. 2 of 1872.

This case and several other cases were referred for the consideration of a Full Bench upon the construction of the Sections in Madras Act VIII of 1865 which relate to the exchange of puttahs and muchilkas between landholders and their tenants.

O'Sullivan for the appellant, the plaintiff.

Rama Rau for the 2nd, 21st and 41st respondents, the 2nd, 21st and 41st defendants.

Bhasyam Iyengar for *V. Sanjiva Rau*, for the 6th, 9th, 10th, 12th, 17th, 27th, 30th and 31st respondents, the 6th, 9th, 10th, 12th, 17th, 27th, 30th and 31st defendants.

The questions referred for the opinion of the Full Bench were :—

(1) Whether a suit for arrears of rent should be dismissed unless the provisions of Section 7 of Act VIII of 1865 (Madras) have been complied with.

(2) Whether the tender of a puttah after the expiry of the Fasli to which it relates is a valid tender.

The Court delivered the following judgments :—

KINDERSLEY, J.—Section 7 of Madras Act VIII of 1865 provides that no suit brought, and no legal proceedings taken, to enforce the terms of a tenancy, shall be sustainable unless puttahs and muchilkas have been exchanged, or un-

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less it be proved that the party attempting to enforce the contract had tendered such a puttah or muchilka as the other party was bound to accept, or unless both parties shall have agreed to dispense with puttahs and muchilkas. The question is whether the prohibition contained in this section applies to suits brought before the Civil Courts for arrears of rent.

Section 87 of the same Act runs thus:—Except as hereinbefore provided to the contrary, landholders and others shall be at liberty to file suits in the Civil Courts for arrears of rent or revenue due to them when they may see fit to do so. But in the decision of suits regarding rates of rent the Court shall be guided by the provisions of this Act.

The right to bring a suit before the Civil Courts for arrears of rent would seem to be a matter of course, unless there should be some provision of law to the contrary. Section 87, just quoted, points to some provision to the contrary in the same Act, and I conceive that it plainly points to the limitation of that right by Section 7, and by Section 13, which is the corresponding Section having reference to leases granted by ryots to their tenants. It has been objected that, taking a comprehensive view of the history of legislation on this point, it would appear that Sections 7 and 13 apply only to summary proceedings before the Collector, and have no reference to suits before the Civil Court; that the debates and proceedings of the Legislature show that it was not the intention to interfere at all with the jurisdiction of the Civil Courts; and that the final clause of Section 87 would be unmeaning because no question regarding rates of rent could arise where a puttah and muchilka had been exchanged. To take the last objection first in the case supposed, the Court would follow rule I of Section 11, which provides that all express contracts for rents shall be enforced; and it is clear that questions regarding the rates of rent might easily arise in cases where there had been a mere tender, or where there was an agree-

ment to dispense with puttah and muchilka. I cannot therefore agree that the final clause of Section 87 would have no meaning if applied to the provisions of Section 7. It is possible, but I think not probable, that the exception at the commencement of Section 87 may relate to some section contained in the bill as at first drawn, but struck out before the bill passed into law. I did not think that this was made out by any thing which was said in the argument, and I doubt the propriety of construing an enactment by a reference to the debates and proceedings which led to it.

Then as to the previous course of legislation, Section 40 of Regulation XXVIII of 1802 expressly provided that nothing contained in that Regulation should prevent landholders or farmers of land or other persons vested with the power of distraint from prosecuting in the Zillah Court for arrears due to them. But by Regulation V of 1822, Section 9, suits preferred in the Zillah Court for arrears of rent where no puttah had been granted were to be dismissed with costs, unless it should be proved that a puttah had been tendered and refused, or that both parties had agreed to dispense with puttah and muchilka. Thus the restriction imposed by the Madras Act VIII of 1865, Section 7, was equally imposed by Section 9 of Regulation V of 1822 on the jurisdiction of the old Zillah Courts. Those Zillah Courts, I understand, were established under Regulation II of 1802 and were presided over by a Judge who was not the Collector, and Section 9 of Regulation V of 1822 does not seem to be affected by the previous Regulation IV of 1822 which expressly reserved the jurisdiction of the Civil Courts from the operation of certain Regulations of 1802. It did not reserve that jurisdiction from the operation of the following Regulation V of 1822. The terms "no suit brought and no legal proceedings taken to enforce the terms of a tenancy" appear to me sufficiently wide to include suits in the Civil Courts for arrears of rent. The reservation of rent being one of the terms of a tenancy, a suit for rent would be one to enforce that term. On looking through the old Regulations I have been unable to find any thing which satisfactorily shows that Sections 7 and 13 of the new Act do not apply

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to suits before the Civil Courts, and the words in their primary meaning plainly include such suits. It would have been of little use to insist on the exchange of puttahs and muchilkas, if suits could be sustained without them.

INNES, J.—The point contended for in R. A. No. 131 is that Section 7 of Madras Act VIII of 1865 has no application to regular suits in the Civil Courts, and that consequently suits for arrears of rent are maintainable in the Civil Courts without the exchange of puttah and muchilka or the substitutes for that exchange which are required by Section 7 as essential preliminaries to the institution and prosecution of suits and other legal proceedings.

The Act is a consolidating Act, and it is desirable first to see how the law stood prior to the enactment.

Regulation XXVII of 1802, is the first Regulation bearing directly on the question. The object of the Regulation was, as the preamble shows, to provide for the recovery, by summary process, of arrears of rent due to landholders by their tenants and to save the parties the expense and delay attendant upon law suits in the Courts.

The Regulation lays down rules for lawfully making distraint and sale of the property of a defaulter and arrest of his person. There were subsidiary provisions also for the protection of the tenant from the abuse of the process so authorized. The injured tenant was to have damages from the wrong doer with costs of suit. Sections 3, 4, 6, 8, 9, 14, 15, 16, 17, 18, 19, 21, 25, 26, 29, 35, 38. Clause 8, Section 13 also authorizes an award of damages.

On the failure of the landholder to realize the arrear by distraint, he was authorized to cause the arrest of the defaulter, and for this purpose to take certain proceedings before the Judge of the Zillah Court, and in certain events arising out of these proceedings the Judge was authorized (Section 34, Clauses 4 and 5) to make a summary enquiry into the merits of the case and determine whether the amounts claimed as arrears of rent were due or not, and to act in either behalf in the mode prescribed by Clause 5.

In the former case the defaulter may be kept in arrest till payment; in the other he is to be discharged, with costs and damages payable by the landlord.

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The party against whom the Judge decided in this summary inquiry might institute a regular suit in the Court, and if he established his case might recover what would compensate him for the amount paid under the erroneous decision arrived at on the summary enquiry, with costs of both proceedings. No appeal lay to a Higher Court from this decision (Sections 35, 36 and 37). The Courts of Adawlut were instituted only six months before the enactment of this Regulation. It is to be inferred from Regulation II of 1802, under which the Courts were established, that it was not intended to exclude suits for arrears of rent from the cognizance of the Courts, and it is apparent from the preamble to Regulation XXVIII of 1802 that its object was to give landholders the remedy by distraint and arrest as *an alternative remedy* to a regular suit, and Section 42 of Regulation XXVIII (evidently to obviate any misapprehension which might arise from the provisions of Sections 36 and 37) prohibits such a construction of the Regulation as would "prevent persons vested with the powers of distraint from "prosecuting in the Zillah Court of Adawlut for arrears due "to them from under farmers or ryots or their sureties." It goes on to say, "when they may prefer the mode of "procedure in the Zillah Court to that of distraining personal property for the recovery of arrears, proprietors or "farmers of land shall be free to do so." By Regulation XXX "of 1802 "to the end" as the preamble declares that cultivators and under tenants of land may have the benefit and "protection of determinate agreements," the exchange of puttahs and muchilkas is positively enjoined.

The provisions of Regulation XXVIII of 1802, which were originally applicable to permanently settled districts only, were extended by Section 6 of Regulation II of 1806 to all districts in which Zillah Courts may be established under this Regulation; and that portion of Regulation XXX of 1802 which enjoins the exchange of written terms of agree-

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ment between landlords and tenants is extended by Section 4, Regulation II of 1806, to engagements of Collectors with ryots.

The injunction to exchange written engagements was plain enough, but no means were provided for compelling its observance, and it is easy to see that it would not be regularly observed except by the officers of Government. Regulation V of 1822 declares that "the provisions of Regulations "XXVIII and XXX of 1802 have been found insufficient for "the due protection of the ryots" in whose interests principally it is clear Regulation V of 1822 was enacted. In pursuance of the recital in the preamble of the expediency of investing Collectors with authority to take primary cognizance of "all cases which under the provisions of those Re-"gulations (XX and XXX of 1802) are cognizable by sum-"mary suit in the Courts of Adawlut," it proceeds in Section 2 to transfer this authority to the Collectors, with certain exceptions. Section 9 enacts that "suits preferred in the Zillah "Court for arrears of rent or revenue from under farmers or "ryots or their sureties where no puttah has been granted "shall be dismissed with costs, unless it shall be proved "to the satisfaction of the Judge that a puttah had been tender-"ed and refused, or that both parties had agreed to dispense "with the use of puttah and muchilka."

Now there is nothing in this Section, standing by itself, to admit of any other construction being put upon the word "suits" than that it means ordinary suits, or as they are called in Regulation XXVIII of 1802, and in the preamble of this Regulation, "Regular suits" as opposed to '*summary suits.*'

Now the contention is that by the similar language of Section 7, Madras Act VIII of 1865, Regular suits in the Courts are *not* intended; but if Section 9 of Regulation V of 1822 refers to Regular Suits, the provision which it is said the Legislature did not intend by the language of Section 7, Madras Act VIII of 1865 would at least be shown to have been the existing law up to the date of the enactment of that Act.

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Now is there any thing in Regulation V of 1822, viewed as a whole, to favor the contention that any other than regular suits were intended in Section 9 ?

Section 2 of Regulation V of 1828 transfers to the cognizance of the Collector all cases which, under the provisions of Regulation XL of 1802, were summarily cognizable by the Zillah Courts, with exception of the cases referred to in Sections 35 and 40, Regulation XXVIII of 1802. No doubt there is here a reference to Sections 35 and 40 as Sections which relate to summary suits, whereas the language of those Sections ' Regular judicial investigation and decision in the Courts of Adawlut," "nothing contained in this Regulation shall be construed to prevent persons from instituting suits in the Zillah Courts of Adawlut" " from prosecuting in the Zillah Courts of Adawlut," renders it perfectly clear that the suits mentioned in those sections are regular suits and, in the absence of any express declaration in Regulation V of 1822 that the suits intended by those sections were summary suits, a natural construction must be attached to the language of those sections, notwithstanding that Regulation V of 1822, Section 2 refers to them as relating to summary suits. It, therefore, comes to this, that the provisions of Regulation V of 1822, transferring to Collectors the cognizance of certain suits up to the date of enactment of that Regulation cognizable by the Zillah Courts, did not embrace the regular suits referred to in Sections 35 and 40 of Regulation XXVIII of 1802, the cognizance of which remained as before with the Zillah Court of Adawlut.

If there were any ground for saying that these *were*, or were declared by the Legislature to be, summary suits, the further contention might perhaps not be without some appearance of foundation that the word ' suits' in Section 9 has reference solely to the suits mentioned in the previous Section 2, as still left to the cognizance of the Zillah Courts and therefore embraces summary suits *only*, and that the institution of regular suits is independent of the conditions which Section 9 requires should be complied with as preliminary to the institution of the summary suits referred to in it.

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But even this, I think, would be a forced construction since there is nothing in Section 9 to qualify the meaning of the word 'suits' used in it, which in its ordinary sense would of course include regular suits.

It is apparent from the provisions of Section 3 which for the first time makes the grant, or tender and refusal of puttah, prerequisite to the sale of property attached under Regulation XXVIII of 1802 for discharge of arrears of rent or revenue, that the Legislature had found that a sanction was required to the observance of the law enjoining exchange of puttah and muchilka. And there appears nothing, therefore, strange in the provisions of Section 9 in shutting out landlords from suing in the Zillah Courts for arrears of rent except on the same conditions as those required before proceedings in distraint in the Court of the Collector for arrears of rent could be rendered effective by sale of the attached property. I am, therefore, of opinion that up to the date of the enactment of Madras Act VIII of 1865, the Courts were precluded from taking cognizance of regular suits for arrears of rent except under the conditions of Section 9, Regulation V of 1822.

This is also in accordance with the view taken by the late Saddr Court in Special Appeals 58, 59, 60 of 1857 and 412 of 1860.

Now Section 7 of Madras Act VIII of 1865 appears to embody the provisions of the two Sections 3 and 9 of Regulation V of 1822. But, it is argued, the Section cannot embrace regular suits in the Courts, because, if it did so, it would be inconsistent with the terms of a later Section (Section 87). Now that section runs as follows :—Except as herein before provided to the contrary, landholders and others shall be at liberty to file suits in the Civil Courts for arrears of rent and revenue due to them when they may see fit to do so. But in the decision of suits regarding rates of rent the Courts shall be guided by the provisions of this Act.

It is said if Section 7 be applicable at all to regular suits in the Courts, suits as regards rates of rent must ne-

cessarily be included in the term "suits to enforce the terms of a tenancy" used in Section 7. But here is a special provision that in the decision of suits regarding *rates of rent* the Courts shall be guided by the provisions of this Act, implying that this Act is not intended to govern other suits regarding rent which may be instituted in the Courts.

But this view of the question appears to me to be unsound. Let us assume, for the sake of argument, that the words "except as herein before provided to the contrary" in Section 87 have reference, if not sole reference to the provisions of Section 7, then I see nothing to prevent the words:—"But in the decision of suits regarding rates of rent, the Courts shall be guided by the provisions of this Act;" from being read consistently with the language of Section 7, though that language be held to apply to regular suits.

It is clear that as respects suits for rent over which (although puttah and muchilka have not been exchanged) the Court has cognizance by reason of there having been a tender of a puttah, or an agreement to dispense with a puttah, there may be a contention regarding rates of rent. The words "suits regarding rates of rent" may be read without violence as meaning suits involving disputes regarding rates of rent, which is the exact expression used in Section 11 in reference to such suits before the Collector.

Now if this provision at the close of Section 87 were wanting in the Act, the Courts in such cases would not be bound to follow the directions of Section 11 as to the mode in which the proper rates of rent payable are to be ascertained in proceedings before the Collector. The Collector, bound by the directions of Section 11, would be ascertaining and determining the rates of rent on the principles laid down in that section, while the Courts might be following principles of a totally different character.

If a contract for a certain rate of rent ("express or implied" as Section 11 has it,) were shown to exist, no doubt the Courts, equally with the Collector, would feel bound to enforce it; but it is not inconsistent with the

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circumstances of a puttah having been tendered, or with the existence of an arrangement to dispense with puttah and muchilka, that there may yet have been no contract express or to be implied from the conduct of the parties, or at least that such contract in the terms alleged by the landlord may fail to be established to the satisfaction of the Court. Then it is easy to see the enormous inconvenience that would arise if when driven to determine what is the proper rate of rent the Courts should proceed to act upon different principles from those laid down for the guidance of the Collector in such cases.

So that it appears to me that there is nothing in the closing provision of Section 87 inconsistent with the application of Section 7 to regular suits in the Civil Courts.

Further, unless the words "except as hereinbefore provided to the contrary" have reference to the pre-requisites to the jurisdiction arising, which are specified in Section 7, it does not appear to what they can be held to apply, as there is no other expression in the Act which expressly or impliedly excludes or limits the jurisdiction of the Courts.

I am of opinion, therefore, that Section 7 of Madras Act VIII of 1865 applies to regular suits in the Civil Courts and that it embodies a pre-existing provision of the law, the object of which was in its origin and still is to force landlords to enter into written engagements with their tenants, an object which it is easy to see must, if carried out, be of the utmost advantage to all parties and the provision therefore not unnaturally, as it appears to me, finds a place in such a law.

I would therefore, as regards Regular Appeal No. 131, dismiss the Appeal so far as it relates to this point.

Holloway, J.—In my opinion the key to the construction of this Act is the existence of two coincident processes, one called summary and the other regular.

The scope of the Act seems to me to show the necessity of an interpretation restricting "the suit brought" and "pro-

ceedings taken" in Section 7 to suits and proceedings under this Act. 1874. *February* 16. *R.A. No.* 131 *of* 1872.

The purpose is the consolidation and simplification of laws already passed and the providing of a uniform process for the recovery of rent. The laws consolidated are those contained in the schedule and it is therefore peculiarly necessary to see what their true construction was.

Before V of 1822 the Zillah Courts alone were invested with two sorts of jurisdiction. Regulation V of 1822 gave concurrent jurisdiction to the Collectors with respect to the so called summary suits.

Act VII of 1839 shews that concurrent jurisdiction as still existing, abolishes the Native Commissioner who had hitherto been able to proceed side by side with the Tahsildar, and subjects the proceedings of the Tahsildar *as to his executive functions* to the Collector only.

The preamble of Regulation V of 1822 shows to my mind very clearly the narrowing of the scope of the whole of the Regulation to cases falling without Sections 35 and 40 of Regulation XXVIII of 1802.

There were, therefore, still two tribunals with this so called summary jurisdiction, and the intended alleviations of the tenant required the restriction of both. Sections 34 & 35 of Regulation XXVIII of 1802 are still in operation. The Zillah Judge might still proceed in his summary enquiry and arrive at his result which either party could still rip up and reverse by a suit regularly instituted subject to the ordinary rules of Appeal (Sections 35 & 36). Section 9 therefore became necessary in order to narrow this summary remedy to cases in which puttahs had been granted, tendered, refused, or dispensed with. It seems to me clear, on the whole scope of these Regulations and the construction of them according to their purpose, that Section 9 applies to these summary suits only. Be it observed that unless this was done all the previous provisions were futile, for the Zillah Judge under Sections 2 to 5 might, despite those provisions, have put the offender in prison, and under Section 6 the pro-

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perty of the defaulter might have passed to the possession of the landlord.

This construction therefore gives to the words of Section 9 a perfectly intelligible object consistent with the reason and scope of the Regulation, while to give to it a general construction would be to depart from that declared scope altogether. The object was to take security that the summary procedure was not allowed to the detriment of the tenant. That security was not considered needed as to suits in the regular way, and in fact every one of these summary decisions was under the old Regulations and continued under Section 10 of Regulation V of 1822 reviewable and reversible by a regular suit. I am of opinion that the process intended was not an appeal in the ordinary acceptation of the word but a regular suit, the same remedy as the old Regulations provided. I think, therefore, that the decisions of the Sadr Court (very few in number) both as to the extended scope of Section 9, and as to the proceeding being a mere appeal are not in accordance with the proper construction of the Act.

In the course of the argument I referred to Regulation IV of 1822, passed one week before V of 1822, construing the previous Regulations. I still think that that Regulation has an important bearing upon this matter. It declares explicitly that no definition of right was intended. Its effect I have elsewhere considered. (III, *Madras High Court*, 13).

If this Regulation had succeeded Regulation V of 1822, it would absolutely conclude the question, for I apprehend that one of the most important of a man's rights is the right of action. To declare the requisites to an action being brought is to define a right on one of its most important sides; to add a requisite not pre-existent is to limit it; to take it away altogether is to infringe it; and no one of these things was intended by the Regulations which were about to be amended. It would certainly be a strange departure from the logic as well as the practice of construction to extend the words of an amending Act without the smallest necessity to matters which the substantive Acts did not embrace at all. It would

be still more singular if with the draft of Regulation V of 1822 already in their desks the Legislature had volunteered this declaration of intention which they were about to violate seven days afterwards. Probably the exigences of printing were the only reason for the Regulations not passing together. Whether they passed together or not a long array of cases shows that relating to the same matter they can by no process be separated in construction. According to the English doctrine they could not have been if they had all been repealed. (See *Dwarris on Statutes*, 568 seq.)

The conclusion seems to me obvious both upon legal logic and upon the cases. The whole array of these Acts is concerned with expeditious remedies and the narrowing of rights is not embraced by them.

I put then the same construction upon Section 7 of the consolidating Act as upon Section 9 of the old. The Act is in *pari materiâ* with it. I should do so if the words were against it but there are throughout this Act constant indications that the summary procedure is still the matter dealt with. The "herein-before provided" of Section 87 is the most plausible argument that some restriction upon Civil Suits went before.

The answer however is, perhaps, that the summary jurisdiction of the Civil Courts was meant to be preserved, and perhaps that it was put in to meet unforeseen difficulty.

The passage at the end, however, is a further proof of what seems to me obvious, that all these Acts have a restricted operation. If it generally applied why should the rates of rent be specified. The arguments from isolated expressions in Acts made in the fashion to which we are accustomed is worth little and I would not press it on either side.

MORGAN, C. J.—Various questions touching the construction of the Madras Rent Recovery Act VIII of 1865 arise in the several cases referred to the Full Bench. I do not find in the orders of reference that any of these are particularly mentioned as the questions which we are asked to consider, but from the course of the argument it be-

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came evident that the main controversy relates to the construction of Sections 7 and 87 of the Act. The former Section enacts that no suit shall be sustainable to enforce the terms of a tenancy unless puttahs and muchilkas have been exchanged: by the latter Section landholders to whom arrears of rent are due are left free to sue for such arrears in the Civil Court "except as hereinbefore provided to the contrary." It is contended that the remedy by suit in the Civil Court is open to the landholder, although there has been no interchange between himself and the tenant of the writings enjoined by this Act.

I will consider first the question as it arises between the landholders specified in the 3rd Section of the Act and their tenants; and it will be sufficient for present purposes to describe the two classes of persons by the old terms of zemindars and ryots.

The Act of 1865 requires written agreements between these landholders and their tenants, "the engagements of the landholders being termed puttah, and those of the tenants being termed muchilka." Special provision is made concerning the several matters to be therein stated: their execution and registration is also provided for, and penalties are imposed on the landholders for any unauthorized exactions in excess of the rent or charges specified in the puttahs. It is not necessary now to consider to what extent and for what purpose the relation of zemindar and ryot may arise and exist without the interchange of these writings, but it is certain that the remedy by suit and by legal proceedings under this Act will be wanting to the enforcement of the terms of a tenancy when the parties have not entered into these written agreements.

It is beyond dispute that these persons are absolutely deprived of all the remedies which the Act itself gives to enforce the terms of the tenancy, but it is argued that the words of the 7th Section refer only to such remedies; the remedy by suit in the ordinary tribunals for the recovery of arrears of rent is, it is said, a thing apart and a remedy which the landholders have always enjoyed and which is

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expressly saved to them by the 87th Section of the Act. But the words of the law are opposed to this argument. In many places this Act distinguishes between proceedings under the Act and proceedings in the ordinary Courts (See Sections 2—13, 78—86.) In the Section now in question there are no words indicating that remedies under the Act or any particular kinds of remedy were intended; on the contrary the language is comprehensive :—" no suit brought and no legal proceedings taken to enforce the terms of a tenancy shall be sustainable, unless puttahs and muchilkas have been exchanged as aforesaid, or unless it be proved that the party attempting to enforce the contract had tendered such a puttah or muchilka as the other party was bound to accept, or unless both parties shall have agreed to dispense with puttahs and muchilkas."

Unless for strong reasons we should not be justified in limiting this plain and comprehensive language in the way suggested. But it may be said that the scope of the enactment itself requires some such limitation ; that the Act as it is described in the title is for the most part a mere consolidation of former laws " which define the process to be taken for the recovery of rent," and that this new law, like the old Regulation, which it supersedes, deals only with summary remedies and has no application to the remedy by regular suit in the Civil Court.

Reg. XXVIII 1802.
XXX 1802.
II 1802 S.S. 4 & 6
V 1822.
I 1826.

Let us see what was the state of the law before the enactment of Act VIII of 1865. The list of repealed Regulations given in Section 89 shews the laws which the Act displaced and which it professed by its title and preamble not only to consolidate but also to simplify and improve. Regulation XXVIII of 1802, after reciting that it was " necessary to the punctual collection of the public revenue that landholders and farmers of land should have the means of compelling payment from defaulters without being obliged to have recourse to the Courts of Judicature and incurring the expense and delay necessarily attending a law process for the recovery of arrear of rents or revenues"

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gave to proprietors and farmers of land various stringent and summary remedies by distress, attachment and otherwise, for the recovery of such arrears.

By another Regulation (Regulation XXV of 1802) enacted at the same time, the Government was authorized to make a permanent settlement of the land revenue and to grant by deed proprietary right " to all persons being or constituted to be Zemindars or Proprietors of land." By the 14th Section of this Regulation, which has in no part been expressly repealed, Zemindars are required within a reasonable period of time to grant to each ryot a puttah.

Regulation XXX of 1802 prescribed the kinds of puttahs and muchilkas to be exchanged between landholders and ryots and provided some remedies for the breach by either party of its enactments. But the Legislature of that day, while clearly indicating in the two Regulations just mentioned the importance it attached to the interchange of the written engagements both for the security of the cultivators and the prevention and settlement of disputes, made very ineffectual provision for the enforcement of the interchange of these written engagements. The landholder who disregarded the injunctions of the law was nevertheless in a position to assert all the summary remedies which the Regulation XXVIII of 1802 gave to him. In one case only did his omission to grant a puttah affect his remedy for the recovery of his rent. By the 6th Section it is provided that, in the event of claims being instituted by proprietors of land on engagements in which the rents or revenues may not be consolidated in a puttah, such claimants shall be non-suited with costs before the Adawlut of the Zillah from and after the expiration of two years subsequently to the time when the permanent assessment of the land revenue may have been fixed.

It is from this clear that the Legislation of 1802, however defective in other respects, imposed this penalty of nonsuit on the landholder who, without having granted a puttah to his ryot, sought his remedy for arrears of rent by suit in the ordinary Courts.

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After an experience of twenty years which abundantly showed the inefficacy of the puttah Regulation of 1802 to effect the object in view, Regulation V of 1822 was passed, by which Collectors were authorized to take primary cognizance by summary process of many of the matters which by Regulations XXVIII and XXX of 1802 were cognizable by the Zillah Courts (though not summarily cognizable as the new law erroneously assumed). In one case (see Section 34, Regulation XXVIII of 1802) in which a summary enquiry by the Judge was expressly directed by the Regulation of 1802, the language of the latter Regulation (Section 6) and of Act VII of 1839 seemed to show that the Civil Court retained in this instance its summary jurisdiction. Whether it did so or not I can find in the reports no trace of the exercise by the Courts of this summary jurisdiction. With this exception, if exception it be, the jurisdiction of the Courts in cases under the two Regulations was transferred to the Collectors, and there remained to the former the undoubted jurisdiction which they always possessed of adjudicating in the form of regular civil suits upon claims by landholders for arrears of rent. Two important clauses were enacted to promote the granting of puttahs. No property attached under Regulation XXVIII of 1802 for arrears of rent could be sold unless puttahs had been granted or tendered and refused; and no suit for such arrears could be maintained where no puttah had been granted. The words of the 9th Section are clear :—"suits preferred in the Zillah Conrt for arrears of rent or revenue from under farmers or ryots or their sureties, where no puttah has been granted, shall be dismissed with costs, unless it shall be proved to the satisfaction of the judge that a puttah had been tendered and refused, or that both parties had agreed to dispense with the use of puttah and muchilka." This language, sufficiently clear in itself, is supported by the distinct declarations of the intention of those who at that time had full authority to instruct their representatives in this country to enact such laws as they deemed expedient, I mean the Court of Directors of the East India Company.

In a Despatch to the Governor in Council at Fort St. George, dated the 29th April 1814, the following passages

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occur. "We cannot pass by this opportunity:—of recalling to your attention the observations contained in our Revenue letter of the 16th December 1812 as to the enforcement of the Regulations concerning puttahs : a strict observance of that Regulation would tend, we are convinced, equally to the benefit of the landholders and their tenants: by rendering their respective rights and obligations more certain, it would facilitate the adjustment of disputes concerning rent or cultivation, and would thereby operate as an additional relief to the Courts of Jnstice.

"We trust that, in consequence of our former reference to this subject, it has already occupied your attention.

* * * *

"The puttah Regulation duly observed would afford the best safeguard against oppression and would have the effect of preventing in a great degree those disputes respecting rent by which the country is so frequently disturbed. The enforcement of it is a concern of Government and the means of carrying it into execution ought to be secured by an adequate process. The superintendence of this matter naturally falls to the Collector, in his Magisterial capacity, whose duty it should be with the assistance of the native officers under him to take cognizance of any breach of this Regulation, whether by the refusal or neglect to grant puttahs. No demand of a Zemindar, &c., for arrears of rent should be receivable in any Court but on a puttah, nor should he be at liberty to proceed to sell under distraint without an order from the Collector founded (if that should be necessary) upon a report from the Potail or Tahsildar, the Village and District Punchayet respectively.

"The Commissioners, Colonel Munro and Mr. Stratton who proposed this Regulation, in submitting it to the Government, say, while commenting upon the Section :—" the Court of Directors having required that no demand of a Zemindar, &c., for arrears of rent should be receivable in any Court but on a puttah (para. 107) we conceive that the provisions of this Section which prescribes that such suit shall be dismissed with costs when not founded on a puttah unless it be proved

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that a puttah had been tendered and refused will meet the views of the Honorable Court."

The language of the law and the previous intentions thus plainly declared of its framers and promoters thus appear to admit of no doubt. A Zemindar's suit in the Civil Court for arrears of rent was liable to non-suit under the Regulation of 1802 and to be dismissed with costs under the Regulation of 1822 if no puttah had been granted by him. The Act of 1865, having repealed these Regulations, proceeds itself to declare, as we have seen, that no suit brought to enforce the terms of a tenancy shall be sustainable unless puttahs and muchilkas have been exchanged, and while saving, by Section 87, to landholders and others their remedy by suit in the Civil Court for arrears of rent, it gives the condition under which this remedy is preserved in the words at the beginning of the Section 87. "Except, as hereinbefore provided to the contrary" words which suffice and which were I presume meant to refer to the preceding provisions concerning puttahs and muchilkas.

The result in my judgment is that suits for arrears of rent by Zemindars and other landholders mentioned in Section 3 of the Act cannot be maintained in the Civil Courts unless puttahs and muchilkas have been exchanged or unless there has been such a tender or dispensation as is contemplated by the Section.

The question arising between other landholders and their tenants is different, because the language of the Act is different. It is provided (Section 13) that "all landholders under Ryotwar settlements or in any way subject to the payment of land revenue direct to Government and all other registered holders of land in proprietary right shall be authorized to proceed under this Act for the recovery of rent, if they have taken a lease or agreement in writing from their tenants specifying the rent to be paid to them, but not otherwise."

The effect of this Section is to give to the landholders therein mentioned all the summary remedies of the Act for the recovery of arrears of rent if they have taken a written agreement from their tenants, but not otherwise. If the land-

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holder omits to take a written agreement his remedies *under the Act* are wanting, but his right of Suit in the Civil Court remains as it was before.

Note:—Kindersley, J. held that Sections. 7 and 13 of Madras Act VIII of 1865 also preclude suits in Civil Courts for arrears of rent, when the conditions respectively laid down therein are not fulfilled.

Morgan, J. agreed with Kindersley, J. as regards Section 7, and, dissenting from him as to Section 13, was of opinion that the landholders mentioned in that Section are competent to recover arrears of rent in the Civil Courts in the absence of the fulfilment of the conditions laid down in Section 13.

Innes, J. agreed with Kindersley, J. and the Chief Justice in respect of Section 7, but gave no opinion regarding Section 13.

Holloway, J. gave no opinion regarding Section 13.

The Court (Morgan, C. J., Innes, J. and Kindersley, J.) also held that where puttahs were required to be tendered, the tender must be made before the expiration of the Fasli for which the rent was claimed in the suit.—See *post* page.

In Regular Appeal No. 131 of 1872 before Holloway and Kernan, J. J. the appellant, a landholder of the kind described in Section 13, was held to be enitled to receive arrears of rent notwithstanding that there was no written agreement.

Appellate Jurisdiction. (a)

Regular Appeal No. 119 *of* 1873.

J. F. SNAITH..............................*Appellant*.

W. McQUHAE, President of the Dindigul Municipality..............} *Respondent*.

The defendant, a Judge of the Small Cause Court at Madura, visited Dindigul once a year and remained there for more than 30 days each year. The defendant took with him to Dindigul his horses and carriages which he used there and in respect of which he paid the taxes imposed by law to the Municipality of Madura where he resided.

In a suit by the Municipality of Dindigul, to recover the tax payable in respect of the same horses and carriages :—*Held*, that the defendant was not liable.

(a) Present :—Morgan, C. J. and Holloway, J.

1874. March 24. R. A. No. 119 of 1873.

THIS was a Regular Appeal against the decision of P. P. Hutchins, the District Judge of Madura, in Original Suit No. 13 of 1873.

The Court of First Instance delivered the following Judgment, in which the facts fully appear :—" This case depends on the construction of the Towns' Improvement Acts, and was called up by consent of both parties for disposal by this Court.

" The plaintiff represents the Municipal Commissioners of Dindigul. Defendant was Officiating Judge of the Small Cause Court of Madura, and in the course of his duties he was obliged to hold Court at Dindigul for more than 30 days in February and March 1871, and again in February and March 1872. During those periods he admits that he kept at Dindigul the horses and carriages for which the plaintiff seeks to recover the usual tax. All the facts are admitted, and I have only to dispose of the various legal objections raised.

" The plea of limitation was given up upon my pointing out that what plaintiff sought to recover was only the tax itself and not the penalty to which defendant might or might not have rendered himself liable by not paying the tax.

" It was then contended that the Municipal Commissioners had a special remedy provided in the Act, and no general right to sue for taxes as for an ordinary debt. Section 161, Act III of 1871, provides that " instead of proceeding by distress and sale, or in case of failure to realize by distress the whole or any part of any rates, taxes, &c., the Commissioners may sue." It was argued that the Commissioners could not have proceeded at all by distress without the intervention of a Magistrate, and therefore that a previous conviction by a Magistrate was a condition precedent to the right to sue. A reference to the Act of 1865 will dispose of this point. Section 161 of Act III of 1871 is merely a re-enactment of Section 141 of Act X of 1865. Act III of 1871 did not receive the assent of the Governor General till 20th March 1871, and the first demand in this

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case seems to fall under the old Act. Under the old Act the Commissioners had the general power of distraining for any rate or tax leviable under the Act (Sections 72, 73) but were authorized to sue instead if they preferred to do so (Section 141.) Although the latter Act has modified the Commissioner's power to distrain under their own warrants, I see nothing in it to lead to the conclusion that the Legislature intended at the same time to restrict their right to proceed by a regular action. Section 158 which was referred to is merely a repetition of Section 137 in the previous Act.

"It was next argued that defendant had paid the tax for the same half-year and on the same animals in Madura, and was not liable again. This was put more upon "the spirit of the Act" than on its letter, whereas I have only to deal with the letter if its meaning is unambiguous. The spirit of the Act, it was said, was that no person should pay twice for the same thing, and Sections 58 and 60 (in X of 1860, Sections 46 and 48) were referred to. Section 58 contains a new clause to the proviso which seems to render the proviso itself wholly nugatory, but even taking the proviso as unattenuated by the following "unless," it merely amounts to this, that no person shall pay in two different Municipalities for the same profession or business. This and Section 60 show that the Legislature contemplated the possibility of such a demand being made, and the omission of any similar provisions in the Sections relating to the tax on horses rather goes to show that they thought these might be paid for in every Municipality in which they were "kept." But it was said this word "kept" meant kept permanently or for an indeterminate period and not merely for the limited time of two months. I see no foundation for this interpretation, and the proviso to Section 65 seems clearly against it—no person shall be liable on an animal which shall have been in his possession for 30 days only.

"I asked the defendant's vakil if he pressed his argument so far as to contend that no one would be liable who during a half year became possessed of a horse which had not been before kept in the Municipality, and his answer

was that such a person would undoubtedly be liable. I asked this because the words under which such a person, and the present defendant becomes liable, are very awkward, and at the first glance capable of a different interpretation. Any person *becoming possessed of a horse so kept* might be taken to imply that the horse was "so kept" before he became possessed of it, or in other words to relate to the ordinary case of a transfer of a horse to another owner within the same limits. Where however the Legislature wish to describe such a case they know how to do it. See Section 75. The words "*becoming possessed of a horse so kept*" seem to me intended to correspond with the words in Section 75 "becoming possessed of any such cart." "So kept" means a horse kept within Municipal limits, and the whole expression, awkward as it is, must be taken to mean any 'person who after the half year has commenced shall become possessed of any horse and shall keep it in Municipal limits.' I have examined Act IX of 1865 from which this Section is taken and the yet older Acts of which it took the place, and I am satisfied that this must be the meaning really intended, as it is also that upon which all Municipalities have admittedly acted."

Decree for the plaintiff for the amount sued for and costs.

The defendant appealed to the High Court on the following grounds :—

I.—Because the defendant is not liable for the taxes sued for within the meaning of Act XX of 1865 or Act III of 1871.

II.—Because the taxes sued for are not recoverable in a Civil Court within the meaning of the said Acts or either of them.

Shephard for the appellant, the defendant.

The Court delivered the following Judgments :—

MORGAN, C. J.—The facts are not disputed and we have only to determine whether the District Court rightly construed the provisions of the Towns' Improvement Acts

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of 1865 and 1871 to authorize the levy of taxes by the Municipal Commissioners of Dindigul on the defendant as the owner of a carriage and horses.

It was the defendant's duty, as Judge of the Madura Small Cause Court, to hold yearly a Court at Dindigul for a period of 30 days and upwards. In the months of February and March 1871 the defendant went to Dindigul and remained there in discharge of his judicial duties for upwards of 30 days, during which time he kept and used within the town the carriage and horses for which taxes are claimed. The first sum sued for is the amount of the tax for the second half year of 1870-71, which is claimed to be a due under the Act of 1865. The defendant, having duly paid the yearly tax imposed by this Act on the owners of the carriage and horses in the Town of Madura, where he resided, disputed his liability to pay also the Dindigul Municipal tax for his carriage and horses, used during his temporary stay there. The Court below has however given a decree in the plaintiff's favor, holding apparently that the 58th Section of the Act of 1865 imposed this tax upon every owner who kept within the town a carriage and horses for any period however brief.

In my judgment this decision cannot be supported. I find no clear and distinct legal authority such as should be shown for the imposition of this burden. On the contrary I find both in the language used to impose the tax, and in the mode employed for its assessment and collection, indications of an intention on the part of the Legislature to make liable settled residents only and not temporary sojourners who might chance to bring with them and keep within the town their own carriages and horses.

The charges imposed by the Act are (except the tolls on vehicles and animals coming within the local limits of the Municipality) all annual charges. The rates and taxes are annual amounts made payable at certain fixed periods. The tax on horses and carriages is described (Section 58) as a "yearly tax" payable half yearly by "the owner of every

carriage, horse, &c., kept within the Town." It is assessed by means of a statement in writing signed by the owner, containing a description of the vehicles and animals, liable to the tax, for which he desires to take out a license. This written statement he is required to send to the office of the Commissioners on or before the 1st day of May and the 1st day of November in each year : and he is bound at the same time to pay to the Municipal Commissioners half of the yearly taxes payable by him. Then follows a clause in these words :— "Any person becoming possessed between the 1st day of May and the 31st day of October or between the 1st day of November and the 30th day of April of a carriage or animal so kept shall, within fifteen days of becoming so possessed, send to the office of the Municipal Commissioners a similar statement, together with the full amount payable for the then current half year according to the said schedule." The clause apparently provides for the case of ownership and possession being first acquired subsequent to the times specified in the early part of the section. The new owner and possessor must within 15 days send in a written statement, and with it the full amount of tax payable for the current half year. This language is inapplicable to persons in the position of the defendant. Mr. Snaith, who came to Dindigal for a few weeks to discharge the duties of his office, bringing with him his own carriage and horses, was not a person subject to any of the obligations imposed by the section. The terms of the requirements of the first part of the section clearly could not be applied to him, nor could he during any portion of his stay at Dindigul properly be regarded as a person who had become possessed of a carriage and horses between the first day of November 1871 and the 30th of April 1872. For like reasons I think that the tax claimed under the Act of 1871 for the second half year of 1871-72 cannot be recovered. The proviso at the end of the 65th Section of this Act, exempting from liability to the tax persons possessed of horses and carriages for a period not exceeding 30 days in any half year, cannot operate to extend the tax to persons not already made liable thereto. I think the decree should be reversed and the suit dismissed,

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the Municipal Commissioners paying all the costs of this litigation.

Holloway, J.—The question turns on the construction of Section 58 of the Act of 1865. The defendant in this case does not appear to have kept a carriage or horse within the town at a time at which the only liability to register take a license and pay the tax is imposed: one month from the notified approval and on the 1st day of May and the 1st day of November. It further does not appear upon the case that the possession of these horses and carriages commenced in the defendant at any intermediate stage. A man becomes possessed of a thing when he takes a thing in the possession of no one and when he obtains possession from a previous possessor. I apprehend that, although "so kept" means merely kept within the town and not kept within the town by a person to whom the liability to register had already clung, the words "become possessed" are not appropriate to the description of the defendant's carriages and horses. So far as it appears he did not become possessed within the period. It is clear that he did not. On the bare words of the Section it seems to me that the judgment is wrong. Of course I am not at all insensible to the absurdities which may follow the only construction possible of these words. If the Legislature had intended to tax every one who kept a carriage and horses within the town for a period of one month they should have said so.

The defendant from the time at which he came to the place is exempt from the first liability which accrues at certain points of time only. He is exempt from the second which depends upon the acquisition of possession.

I agree that the decree should be reversed with costs.

Appeal allowed.

Appellate Jurisdiction. (a)

Criminal Appeals, Nos. 43 *and* 44 *of* 1874.

THE GOVERNMENT PLEADER.........*Appellant.*

Where the Session Judge might upon appeal have convicted the defendants under a different Section of an Act from that under which they were convicted by the Magistrate, but instead of doing so he acquitted them.

Held, upon appeal by the Local Government, that it was not a case which called for the interference of the High Court.

1874. *March* 31. *C. A. Nos.* 43 & 44 *of* 1874.

THESE were Appeals under Section 272 of the Criminal Procedure Code (*b*) against the Judgments of acquittal passed by the Court of Session of South Canara, in Criminal Appeals, Nos. 9 and 8 of 1873, reversing the sentences of the Acting Head Assistant Magistrate of South Canara in Cases Nos. 17 and 15 of the Calendar for 1873 respectively.

The defendants and other persons, fifteen in number, were charged with having imported salt into British India contrary to the restriction imposed by law, an offence punishable under Section 24 of Act VI of 1863. (*c*)

It appeared from the evidence that salt was taken on board a vessel of one of the defendants and brought to Hoodi (not a port or harbour) in the South Canara District, where part of it was landed. The landing of the rest was

(*a*) Present :—Morgan, C. J. and Holloway, J.

(*b*) Section 272 is as follows :—

"The local Government may direct an appeal by the Public Prose-"cutor or other officer specially or generally appointed in this behalf "from an original or Appellate judgment of acquittal but in no other case "shall there be an appeal from a judgment of acquittal passed in any "Criminal Court.

"Such Appeal shall be to the High Court, and the rules of limita-"tion shall not apply to appeals presented under this Section.

The High Court may in any case appealed "direct a new trial "by another Court, or may pass such judgment sentence or order as "may be warranted by law."

(*c*.) Section 24, so far as it is necessary to set it forth, is as follows :—

"If any goods the importation or exportation of which is prohibited "or restricted or shall hereafter be prohibited or restricted be imported "into or exported from British India contrary to such prohibition or "restriction * * * such goods together with any goods which shall "be found packed with or used in concealing them shall be liable to "confiscation; and any person concerned in any such offence shall be "liable to a penalty not exceeding three times the value of the goods, or "not exceeding 1,000 Rupees."

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interrupted by the arrival of the Police, and a quantity of salt was found on board the vessel.

The evidence implicated all the defendants, who were convicted by the Head Assistant Magistrate and fines of various amounts were imposed or in default of payment of the fines imprisonment.

Upon Appeal the Session Judge quashed the conviction on two grounds:—(1), that salt, though dutiable, not being "restricted" article within the meaning of Section 24 the offence did not fall under that Section but under Section 194, and (2) that there was no power to imprison in default of payment of fine (a) as laid down in the proceedings of the High Court dated the 7th December 1866 and 24th April 1873.

The Government Pleader appealed to the High Court against the acquittal under Section 272 of the Code of Criminal Procedure, upon the ground that the Acting Head Assistant Magistrate had power to inflict the fines he did inflict and to enforce payment of the same by imprisonment.

The Government Pleader, for the appellant.

Gould, Contra.

The Court delivered the following

JUDGMENT.—In this case we are asked to exercise the very exceptional procedure permitted by Section 272. If the acquittal by the Session Judge were bad in law and the facts as found by him manifestly made out the offence, there would be no need of the application of the Section.

(a) Section 194." Any person shipping or landing goods or aiding in the "shipment or landing of goods, or knowingly keeping or concealing or "knowingly permitting or procuring to be kept concealed any goods "shipped or landed or intended to be shipped or landed contrary to the "provisions of this Act: and any person who shall be found to have been "on board of any vessel liable to confiscation under Section 13 of this "Act while such vessel was within any bay, river, creek or arm of the Sea "which had not then been declared to be and was not then existing as "a port for the landing or shipment of goods shall be liable to a penalty "not exceeding 1000 Rupees."

Section 225. "When a penalty or fine is adjudged against any person "under this Act by a Magistrate, such Magistrate shall at the same "time fix within the following limits a period of imprisonment in default "of payment of such penalty or fine * * *

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& 44 *of* 1874.

Here however the charge was of an offence under Section 24, for although Section 194 is quoted in the charge, the effect and intent were merely to point to the specific offence described in 24.

Now we agree with the Session Judge that although goods which cannot be imported without payment of duty may etymologically be said to be goods of which the importion is restricted, yet the language of the Act (Section 25 and elsewhere) shows that this was not the meaning.

In strictness of law therefore the Session Judge was right in saying that the offence was not made out. We are inclined to think that instead of acquitting the prisoners he might properly have come to the conclusion that they had not really been prejudiced in their defence, and have allowed the conviction to stand for the offences of which they were manifestly guilty. On such a matter of discretion it would however be a strong thing for us to re-establish the conviction as we are asked to do, even if so doing would be legal.

The course to be taken would probably be the ordering of a new trial, if we thought it desirable to do so. We think, however, that the exercise of our discretion in such a matter requires that we should be satisfied that the case is of sufficient consequence to justify us in acting under this very exceptional Section. We are of opinion that we shall have done enough by making these observations with the addition that the Session Judge is in error in saying that the alternative imprisonment is illegal. Section 225 not only shows that such award is legal, but also shows that the sentence would be bad without it.

Appellate Jurisdiction (a)

Regular Appeal No. 133 *of* 1872.

VENKATA REDDY and 4 others............*Appellants*.

A. LISTER, Esquire, Head Assistant Collector of South Arcot, and 18 others.................................... *Respondents*.

The plaintiffs, who were ryots under the Government, brought the suit to restrain the defendants, the Agents of the Government and others, from so altering a calingula as to diminish the quantity of water which the plaintiff were entitled to receive for the irrigation of their lands, and the plaintiffs alleged that the supply of water had been materially diminished by reason of the acts of the defendants. The only ground upon which the plaintiffs claim was put was that they had received the water for a long time. The District Court held that the Government were authorised to regulate the distribution of water in such cases. *Held*, on regular appeal.—

Per HOLLOWAY, J. That no legal right was shewn by the plaintiffs which could have been violated by the defendants, and that if such right were established there was nothing to shew that a decree for damages would not have been the proper remedy.

Per INNES, J. That the evidence did not shew any diminution of the supply of water below the quantity to which the plaintiffs were entitled.

1874. *April* 15. *R. A. No.* 133 *of* 1872.

THIS was a Regular Appeal against the decision of R. Swinton, the Acting Civil Judge of Cuddalore, in Original Suit No. 6 of 1871.

The plaintiffs, who are seven of the cultivating inhabitants of the village of Padarapuliyur, in the Tindevenam taluq, brought the suit against sixteen cultivating inhabitants of the village of Chendur and against Mr. Lister, the Head Assistant Collector in charge of that part of the district, and Mr. Graham, the Assistant Engineer. The object of the suit was to have cancelled by the Civil Court an order made by the Head Assistant Collector, and confirmed upon appeal by the Board of Revenue, and directing that the calingula, or outlet sluice, in the plaintiff's tank bank should be lowered. The plaintiffs asserted that by so lowering the calingula, the water supply in their tank was diminished so as to hold only three fourths of the water it ought to hold, and that they had a right that their water should spread back over 149 kanies of the lands of Chendur. The prayer of the Plaint was as follows:—

(a) Present:—Holloway and Innes J J.

This suit is brought by the plaintiffs to set aside the Board's order passed upholding the 1st defendant's order, to restore the calingula, constructed a long time ago consistent with the level of the capacity of the tank, valued at Rupees 1,461-10-2 to its original position and state, to cause the 143 and odd cawnies within the boundary of the defendants village of Chendur to be made use of as formerly and according to mamul for the waterspread of the said tank, and to prevent the defendants from interfering therewith.

1874. *April* 15. *R. A. No.* 133 *of* 1872.

The defendants answered that the Government were entitled to make what alteration they considered useful and beneficial to all concerned, and that the order of the 1st defendant was necessary to correct encroachments by the ryots of the plaintiffs' village.

The following was the Judgment of the District Court:—

I found that the issues had been settled and the evidence in this case heard by my predecessor, the third issue being 'whether the 1st and 2nd defendants as agents of Government are vested with any authority, and if so, to what extent, to regulate the supply of water for the purposes of irrigation;' and this being a matter of law, the question of my settling the case, if able to do so, upon the former evidence, was not raised, and the pleaders were directed to confine themselves to it.

The only decision pointed out (by the plaintiff's pleader) was that in the case of *Ponusamy Tevar* v. *The Collector of Madura*, Madras High Court Reports Vol. V. page 6, but it was found not to apply to two common Ryotwari Government villages in which the repair and construction of the irrigation works were completely under the Collector and Engineer; from a portion of the judgment (that at the bottom of page 19) it may be inferred that what is termed the arbitrary power of Government could in such a case be maintained; and of all cases most suitable for the exercise of the authority and discretion of the Revenue authorities, this appears to be one,—the regulation of the waterspread behind one tank-bund so that it should not reach back upon

1874. April 15. R.A. No. 133 of 1872

the irrigated land behind it in juxta position and belonging to another village. Neglect or inability of the cultivators of the area of land originally supposed to be under a tank or channel might encourage those in front to increase their waterspread by lengthening their embankment or raising it, or they might do so finding the level of their tank being raised by deposit of silt, or, *vice versa*, those behind might take advantage of a lessened waterspread in front to extend their cultivation, although there may have been originally an estimate of what the area under each tank ought to be; as these works are in propinquity, I believe in practice, they are extended and altered to suit natural causes, or the necessities or abilities of the people to cultivate; and the Collector and the Engineer of the district have always superintended this upon the complaint or representation of either party.

The plaint does not allege any breach of any regulation against the revenue officer; it is more as a regular appeal to this Court against the decision of the Board of Revenue, for which both parties were contented to wait.

Their remedy, if they have a wrong, would be now to apply to Government; whether the actual revenue is increased or diminished by the change made in the calingula seems to me utterly immaterial; the dispute is essentially one between the two villages.

How far Government can exercise its functions without having a law made to enable it to do so, is a nice matter, but in this case it appears to me that it was so unquestioned that the Revenue authorities had always decided such matters so that no precise law was thought necessary. Regulation XII of 1816 in the preamble laid down that the determining in the Adawlut of the zillah of Suits respecting the cultivating and irrigating of land, as between proprietors or renters and their ryots, was inconvenient, and required Collectors to refer them to Panchayet, and presumably to decide those they did not refer, but these people of both villages are proprietors or ryots, and Section 18 of Regulation I of 1822 which extended the provisions of Regulation XII to all

disputes between ryot and ryot, was repealed by Act VIII of 1865 as if the object of that Regulation I of 1822 had only been to recover rent, and nothing has been provided but some Magisterial powers in the Criminal Procedure Code.

My finding upon the third issue is that the Head Assistant Collector and the Revenue Board had power or jurisdiction over the irrigation of both villages, so that their order to lower the calingula cannot be questioned in a Civil Court; there is no separate or any cause of action against the other defendants; and the suit is dismissed with costs.

The plaintiffs appealed to the High Court for the following reasons:—

The decree is contrary to law in that,—

1. The Government have no such power in the matter of irrigation as the Civil Judge imagines.

2. The appellants have had for a very long time the calingula in question of a greater height than now allowed by the Revenue Authorities.

3. The lowering of the calingula is calculated to cause serious loss to the plaintiffs.

4. The Civil Judge was wrong in disposing of the case on the 3rd issue only.

R. Bálájí Rau for *Sunjiva Rau* for the appellants, the 2nd to 5th and 7th plaintiffs.

The Government Pleader for the respondents, the defendants.

The Court delivered the following judgments:—

HOLLOWAY, J.—This is an application by tenants from year to year to prevent practically by injunction any alteration in a calingula, which has existed for some time.

It is unnecessary to advert to the difficulties which would be in the way of granting it on account of the relief sought being much more extensive than could in any circumstances be granted, because I am of opinion that the case has not a single ingredient necessary to the granting of such a remedy.

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R. A. No. 188
of 1872.

I am unable to understand upon what ground the right is put. It cannot be upon prescription.

It does not stand upon express contract and from a letting from year to year it is impossible to imply a term as against the lessor that he will for all time leave unchanged not only the object let but every thing how remotely so-ever connected with it.

I am unable, therefore, to see any clear legal right which could have been violated by the acts of the landlord's agents.

If it were otherwise the case must fail, for there is not a particle of evidence that, if the changing of the state of things were an injury, it is one which could not be compensated by damages.

In my judgment the case of plaintiff fails on all points and should be dismissed with costs.

The original judgment put the right of the Revenue Board upon the executive authority of the Government, and with that doctrine we were unable to agree. If the acts had proved any violation of a contract by one of the contracting parties, we might have retained the suit and given permission to bring an action for damages.

Innes, J. :—Without at all departing from the principles upon which my judgment proceeded in the case reported at page 60 of Volume VII of the High Court Reports, I am satisfied that the evidence in this case does not show any diminution by the agents of the landlord (the Government) of the supply of water below the quantity to which plaintiffs are entitled for the purpose of carrying on their cultivation as heretofore. The Appeal must be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction. (a)

Appeal No. 8 *of* 1874.

MOONSHEE SHEIK MUSTAN SAIB, and another........................ } *Appellants.*

BENJAMIN BROOKS, Esquire, the Official Assignee of the Court for the Relief of Insolvent Debtors at Madras, and as such the Assignee of the Estate and Effects of Mr. Edmund Barnett, at present a discharged Insolvent Debtor and another....... } *Respondents.*

If there are not conflicting attachments a sale of property under a decree may legally follow upon an attachment made before decree.

1874. *April* 23. *Appeal No.* 8 *of* 1874.

THIS was an Appeal from a portion of the order of Innes, J. made in Suit No. 586 of 1871.

The facts in this case as stated were that the appellant, the plaintiff in a suit to recover money, attached certain immovable property belonging to the defendants before judgment. The plaintiff obtained a decree and prayed for a sale of the property in pursuance of the attachment before judgment. The application was refused, the learned Judge being of opinion that there should be an attachment after decree to warrant an order for sale of the property. The plaintiff appealed.

O'Sullivan for appellants.

The Court delivered the following

JUDGMENT :—So far as we are able to understand this case, the learned Judge directed that the decree should not be executed on property attached before judgment. It would be unsafe, with our imperfect knowledge of the facts, to do more than cancel the present order, which appears not to have been in accordance with the Judge's notes, and leave the parties to apply to the Judge for a revision of it. We will merely say further that, if, as we were informed at the bar, the order resulted from a decision that an attachment prior to judgment is a mere nullity and that no sale can

(a) Present :—Morgan, C. J. and Holloway, J.

1874. April 23. Appeal No. 8 of 1874.

take place without a second attachment, we are unable to agree with that decision.

If there are no conflicting attachments, a sale of property under a decree may, in our opinion, legally follow without further process on attachment previously to decree.

It is one thing to decide that an attachment prior to judgment is invalid relatively to an attachment subsequent to judgment—another, to treat it as simply null. With these observations we dispose of the case.

Appellate Jurisdiction. (a)

Special Appeal No. 200 *of* 1874.

GUDURI JAGANNADHAM............ *Special Appellant.*

RAPAKA RAMANNA and 2 others... *Special Respondents.*

A suit was brought to recover money secured by a mortgage in writing of immovable property made in 1870 whilst the Registration Act XX of 1866 was in force. By Act XX of 1866 the document was not admissible in evidence even to enforce the demand for money, the document not having been registered. By Act VIII of 1871 (the Indian Registration Act) the document was rendered admissible when the suit was brought. *Held* that the document was admissible in evidence.

1874. April 29. S. A. No. 200 of 1874.

THIS was a Special Appeal against the decision of E. C. G. Thomas, the District Judge of Vizagapatam, in Regular Appeal No. 76 of 1873, reversing the decree of the Court of the District Munsif of Razam in Original Suit No. 233 of 1872.

The plaintiff brought this suit on the 8th July 1872 for the recovery, with subsequent interest and costs, from the defendants, of Rupees 353, the amount of principal and interest due on two mortgage bonds executed by the defendants, one on the 28th November 1870, for Rupees 400, and the other, on the next day for Rupees 331.

In their written statement the defendants denied the execution by them of the bond and contended that the document had not been registered pursuant to Section 17 of Act No. 20 of 1866, that, under Section 49 of the Act, they could not be received in evidence, or allow of proceedings thereon, or acquire validity as against immovable property,

(a) Present :—Holloway and Innes, J. J.

1874. April 29 S. A. No. 200 of 1874.

that a similar case where the mortgage lien on immovable property was relinquished, and money only was sought to be recovered, was dismissed by the High Court, who held that an unregistered document was not receivable in evidence.

The issues were (1) whether the documents are receivable in evidence, and (2) whether the defendants borrowed the monies therein specified, and executed the said documents in the plaintiff's favor.

The following is taken from the judgment of the District Munsif upon the 1st issue:—

"I shall consider the first issue.—The documents A and B have reference to land, and their registration appears to have been a matter of necessity under Section 17 of Act XX of 1866, which had been in force on the date of their execution. The plaintiff waives off his lien on the lands mentioned in the said documents and brings this suit for the recovery of the money from the defendants. I have considered the decision of the Privy Council under date the 5th July 1871 in an Appeal preferred from a decision of the Calcutta High Court, and the case therein appears to be one of a similar nature to the present. This decision is quoted at page 431, Madras Jurist, Vol. VI, and it clearly appears from it that in a suit for money, a document may be received in evidence, though unregistered. Besides, the case stated in the decision of the Calcutta High Court under date the 2nd September 1868, in Special Appeal 1288 of 1868, *vide* page 229, Madras Jurist, Vol. V, appears to be also of a similar nature. They also held that an unregistered document may be admitted in evidence in suits for money. As the Registration Act is one and the same for all the Presidencies, there does not seem to me that there is any objection to refer to a decision of the Calcutta High Court. Considering the decisions above referred to, I feel no doubt that the disputed documents are receivable in evidence.

As the case stated in the decision of the Privy Council referred to in the defendant's statement is not of the nature of this suit, that decision will not be of avail to the defend-

1874. April 29. S. A. No. 200 of 1874.

ant's contention. The decision of the Privy Council had been issued on the 5th July 1871 (*i. e.*) subsequently to the date of the Madras High Court's decision.

The Munsif also found the 2nd issue in favor of the plaintiff.

Upon appeal the District Judge gave judgment as follows :—

" At IV, M. H. C. R. 382, Bittleston, J. remarks :—" The Legislature intended to *insist* upon compliance with the above requirements in order that a complete registry of the titles to land might by degrees be obtained," and in compliance with this clear intention the Court ruled that a document referring to land merely as collateral security cannot be received in evidence unless registered.

On these grounds the Munsif's decision must be reversed, and judgment given for the defendants with all costs."

The plaintiff preferred a Special Appeal to the High Court on the ground that the said decree was contrary to law in that :—

The documents sued upon were admissible in evidence without registration for the purposes in the present suit.

Gould for the special appellant, the plaintiff.

Miller for the special respondents, the defendants.

The Court delivered the following

JUDGMENT :—By the law in force at the period of this suit, the document was receivable in evidence for the purpose of establishing the money demand.

The old law did not render such securities void, but merely prevented them from being offered in evidence.

The new law has explicitly adopted the doctrine which the late Chief Justice of this Court believed to be derivable from the old.

The question, being one of the course of procedure, is governed by the law in force at the period of suit.

The decree of the Civil Judge must be reversed and the suit remitted for decision upon its merits. The costs of this appeal will follow the result.

Appellate Jurisdiction. (a)

Special Appeal No. 234 *of* 1874.

KOTAMARTI SITARAMMAYYA.......... *Special Appellant.*
KOTAMARTI VARDHANAMMA............ *Special Respondent.*

The plaintiff was the son of a mother of the deceased husband of the first defendant. The 1st defendant adopted a son 35 years after the death of her husband, in pursuance, as she alleged, of an authority to adopt given by her husband. The suit was brought by the plaintiff to have the adoption declaimed invalid upon the ground that the adoption was made without the husband's authority. *Held,* a fit case for a declaratory decree.

THIS was a Special Appeal against the decision of J. Wilkins, the Judge of the Court of Small Causes at Masulipatam, (as Sub-Judge) in Regular Appeal No. 131 of 1873, reversing the Decree of the Court of the District Munsif of Masulipatam in Original Suit No. 259 of 1872.

1874. *May* 8
S. A. No. 234 *of* 1874.

The plaintiff, who is the son of the elder brother of the 1st defendant's husband, brought this suit alleging that the 1st defendant adopted the 2nd defendant's minor son, that the adoption was invalid, inasmuch as the 1st defendant did not obtain permission from her husband to the above effect; and praying that the adoption should be set aside.

The 1st defendant stated that the adoption was made by her under the instructions given by her husband prior to his death, that the plaintiff did not object to the same though he was aware of it.

The principal question tried was whether there was permission of the 1st defendant's husband for the adoption. The District Munsif found that there was not and he made a decree "in favor of the plaintiff." An appeal was preferred to the Subordinate Judge by the defendant upon the ground that the evidence established the permission alleged.

The following is taken from the judgment of the Subordinate Judge :— "At the time of arguing this case in appeal, the 1st defendant, for the first time, took exception to the suit, and contended that the plaintiff was not entitled to a declaratory decree, as he had suffered no injury by the act of

(a.) Present :—Morgan, C. J. and Innes, J.

1874. May 8. S. A. No. 234 of 1874.

the 1st defendant. This has naturally led me to defer to decide upon the fact on the foregoing consideration.

There is no doubt that by the adoption by the widow, the 1st defendant, of the minor son of the 2nd defendant, the plaintiff sustains no immediate injury in his reversionary right to the property of his late uncle Naganna, as the 1st defendant, the widow, as the guardian of her adopted son, continues to hold the legal custody of the property of her deceased husband; it is only in the case of her death, should her adopted son survive her, that the plaintiff's reversionary right may be actually assailed by the adopted son himself, or by his guardian if he should continue to be then a minor, or if the adopted son should on attaining his majority and management of the estate alienate or waste the said property; it is therefore a matter of enquiry whether, under the circumstances of the case, the plaintiff could legally ask the Court for a declaration of his reversionary right by setting aside the adoption made by 1st defendant, and hence whether the suit is legally admissible or not.

It is manifest that Section 15, Civil Procedure Code, gives the Court a discretionary power to make, or decline to make the desired declaration. The Privy Council in *Nagendu Chundu Mittro* v. *Srimatty Krishna Sundari*, XIX Sutherland's W. R. p. 139, has laid down this doctrine, "It is not a matter of absolute right to obtain a declaratory decree; it is discretionary with the Court to grant it or not; and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for." So again in *Puree Janakhatom and others* v. *Bykunt Chundu Chuckerbutty*, 9 W. R. p. 380; *Baboo Malee Lall and others* v. *Ranee*, 8 W. R. p. 64, it has also been ruled, "a declaratory decree ought only to be passed where some injury appears to be so probable as to lead to the conclusion that, unless stayed by the declaratory decree, the incohate, or threatened injury is inevitable," *Pareejan Khatoon and others* v. *Bykunt Chunder Chuckerbutty and others*, 7 W. R. 96.

What then is the immediate or prospective injury to which the present plaintiff is liable by the said adoption, which has compelled him to seek a declaratory decree from the Court. It is alleged that the widow, the 1st defendant, has applied to the Collector to enter the name of the adopted minor as the Inamdar in lieu of her late husband, and that that Officer is prepared to do so unless the plaintiff should obtain an injunction from the Court setting aside the adoption. It is also alleged that, under the new Limitation Act, a suit to set aside an adoption must be instituted within twelve years of such an adoption, and that if he was to wait till the death of the widow, his suit hereafter may be barred as it may happen after many years, and that meanwhile the adopted son may alienate the property, and his long possession and enjoyment as an adopted son will strengthen his right as heir at law to the estate.

I see no immediate risk or inevitable injury in prospect to the reversionary right of the plaintiff by an illegal adoption of the minor, as, notwithstanding the substitution of the minor's name as the Inamdar, the Inam will still remain in possession and under the management of the widow, the 1st defendant, as the guardian of the minor; and in case of future alienation or waste by the widow, the plaintiff will then have a cause of action. And then as to the bar of limitation, the plaintiff will be in possession to sue whenever he is entitled to a reversion, and that will be on the death of the widow the 1st defendant, should he survive her, and the cause of action will then commence. *Srenath Gangapadhaya* v. *Mahesh Chundari Ray*, 4 B. L. R. F. B. 3; 12 W. R. F. B. 14. Indian Digest, page 683. On the other hand, there are other contingencies which may render the present action unnecessary and premature, either the plaintiff may never survive the widow, the 1st defendant, or the minor himself not live to pass his minority, and any decision like that passed by the Lower Court may not be binding on the adopted son after the death of the widow. The plaintiff's inability to sue will not support the minor's title, whilst the protest he has already made to the Collector

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will show that he had lost no time in disputing the validity of the adoption.

There appears, therefore, no sufficient grounds for a declaratory decree, for, as ruled in *Baboo Joodoo Nundun Peshadsing* v. *Mussamut Nundo Koer*, 1 W. R. 219. " A suit for a declaratory decree under Section 15, Act VIII of 1859, is premature on the part of a reversioner during the life-time of the widow, his right being contingent on her death," and the reasons of the PrivyCouncil in the case already quoted equally oppose such a declaration of right. It is also strongly expressed by the High Court at Calcutta in a similar case like the present of *Ranee Brohmo Moobee* v. *Raya Anunda Cull Roy*, XIX, Sutherland W. R. page 419. " That the plaintiff cannot maintain this suit so far as he seeks to have what he call his reversionary right declared is clear. If he means by that to have it declared that he is the person who would take at this moment if both Opendraw Chandra (adopted son) and the widow were out of the way nobody disputes it. If what he means is to have it declared that he is the person who will ultimately take the property after the death of the widow, no such declaration can be made, for that cannot yet be known." Again, I do not think it is likely that the question whether this suit can be maintained can be settled without determining another question referred to in that same case, namely, whether a decision in it would be binding on the next taker after the death of the widow, whoever that next taker might be.

Under all the circumstances of the case, I believe that the plaintiff's action for a declaratory decree is premature and unnecessary, and would therefore dismiss the suit, and reverse the Lower Court's decision, but considering the nature of the evidence I would adjudge each party to bear his own costs.

The plaintiff preferred a Special Appeal to the High Court against the decree of the Subordinate Judge for the following reason :—

That the said decree is contrary to law in that,

The plaintiff is entitled to bring the suit to set aside the adoption made by the defendant.

Iyasawmy Iyer for *V. Subramanian Sastry* for the special appellant, the plaintiff.

The Court delivered the following

JUDGMENT:—In this suit the plaintiff is the son of a deceased brother of 1st defendant's late husband. 1st defendant has adopted a son 35 years after her husband's death under (as she alleges) express instructions given by him to her to do so.

The plaintiff seeks to set aside the adoption, which, he contends is invalid as not having been authorized by 1st defendant's husband.

The District Munsif gave judgment for plaintiff by declaring the adoption invalid. In appeal the objection was taken that this was not a case for a declaratory decree, and the Subordinate Judge dismissed the suit upon that ground.

The question of the propriety of this dismissal of the suit is what is before us in this Special Appeal. The case quoted by the Subordinate Judge from the full bench rulings of the High Court of Calcutta reported at page 14 of the 12th Vol. F. B. was a case in which the parties were relatively in the same position as in this case; but the plaintiff had deferred bringing his suit till the death of the widow, and that case is only an authority for the position that the cause of action in the suit for the purposes of limitation did not accrue till the death of the widow. But Peacock, C. J. took occasion to observe in that very case, "I do not mean to say that a reversionary heir might not have a cause of action during the widow's life to set aside an invalid adoption, but that would be in the nature of a declaratory suit." The object of the Law in allowing declaratory decrees is to enable persons interested to at once challenge acts which, if passed by unchallenged, would be likely eventually to affect their interests prejudicially. It may be that the interest is so remote or contingent that the Court will say 'wait till the event arises, your suit is premature.' One

1874. May 8. S. A. No. 234 of 1874.

case is seldom so completely on all fours with another that it can be an absolute authority either way forgranting or refusing a declaratory decree. The discretion of the Court must in each case be exercised with reference to the particular aspect of the facts in the case before it. Here, it appears to us that, although plaintiff would not be entitled to any decree declaratory of his reversionary right to the property on the widow's death, he may be entitled to what he asks for; that is a decree to declare as between him and the adopted son the invalidity of the adoption.

The determination of the question of the validity of the adoption depends upon the credit attaching to the evidence as to the authority having been given by the husband, and if plaintiff lay by; appearing to acquiesce in the adoption until the widow's death, such conduct of plaintiff would naturally affect the weight to be given to the arguments impugning the credibility of the evidence, and tend to prejudice plaintiff. He is therefore entitled to have this question tried and determined in this suit, and we shall reverse the decree and remand the suit for trial *de-novo*.

Suit remanded.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 335 *of* 1873.

MUTHUSAMI PILLAI..............................*Appellant.*

MUTHU CHIDAMBARA CHETTI..............*Respondent.*

According to Section 13 of Act III of 1873 (the Madras Civil Court Act) it is the money value of the original suit that fixes the Jurisdiction throughout the subsequent litigation in its several stages.

Held, therefore, where the amount of the Original Suit was more than Rupees 5,000, and an appeal was preferred to the District Court, but the amount in dispute in the appeal did not exceed Rupees 5,000, that the District Court had no jurisdiction to hear the appeal.

1874. May 12. C. M. S. A. No. 335 of 1873.

THIS was an appeal against the order of F. M. Kindersley, the District Judge of South Tanjore, dated the 29th September 1873 passed on Civil Petition No. 711 of 1873, reversing the order of the Sub-Court of South Tanjore, dated 2nd August 1873.

(a) Present :—Morgan, C. J., Innes and Kindersley, J J.

1874. May 12. C. M. S A. No. 335 of 1873.

The case was brought up to the High Court on a Special Appeal from an order of the District Judge of South Tanjore, made on an appeal from the Subordinate Court of Tanjore, refusing to allow interest on money due under a decree. The objection was taken in the District Court that that Court had no jurisdiction to hear the appeal, under Section 13, Act III of 1873, it being one from an order in a suit the subject-matter of which was more than Rupees 5,000 in value, although the amount in dispute in appeal was less than Rupees 5,000. The following is taken from the judgment of the District Judge. "The question is, what is the meaning of the word "suit" in this Section? Is the term "suit" confined exclusively to the original action brought in the Lower Court? I think not." In this view the Judge decided that he had jurisdiction.

The appellant preferred the present appeal on the ground that the District Judge had no jurisdiction.

R. Balaji Rau, for the appellant.

Bausheyam Iyengar for the Honorable *V. Sanjiva Rau*, for the respondent.

The Court delivered the following

JUDGMENT:—In this case as "the amount or value of the *subject-matter of the suit*" exceeded 5,000 Rupees, the District Court had no jurisdiction to hear the appeal. The words of the Section are clear. It is the money value of the Original Suit that fixes the jurisdiction throughout the subsequent litigation in its several stages.

The Judge, on the ground that the matter in dispute in the appeal before him was less than 5,000 Rupees, determined that he had jurisdiction under the words of Section 13, Act III of 1873. ("The Madras Civil Courts Act" (*a*) which we have above quoted.) The word "suit" he would

(*a*) The Section is as follows:—

"Regular or Special Appeals, or Appeals under Madras Reg. XI "of 1832, Section 9, shall, when such appeals are allowed by law, lie "from the decrees and orders of a District Court to the High Court. Ap- "peals from the decrees and orders of Subordinate Judges and District "Munsifs shall, when such appeals are allowed by law, lie to the District "Court, except when the amount or value of the subject-matter of the "suit exceeds Rupees five thousand, in which case the appeal shall lie "to the High Court. * * *

1874. May 12. C. M. S. A. No. 335 of 1873.

construe, he says, as meaning in such a case as this "suit on appeal" that is in effect the clause would be read as if the words were "the amount or value of the subject-matter in dispute in the appeal" and various anomalies are suggested as likely to arise from a different construction. It would not be difficult on the other hand to suggest inconveniences from the reading adopted by the Lower Court. But it is sufficient for us to say that the language of the Legislature is clear and that the intention was to make the value of the suit, and not of the matter in dispute in the appeal, the criterion by which to determine Appellate Jurisdiction.

Appellate Jurisdiction. (a)

Referred Case No. 25 *of* 1874.

BHEEMANGOWDA *against* EERANAH.

Payment endorsed on a bond by direction of the obligor who cannot write and signed with his mark is an acknowledgment in writing within the meaning of Section 20 of Act IX of 1871 (the Indian Limitation Act.)

1874. May 22. R. C. No. 25 of 1874.

THIS was a case referred for the opinion of the High Court by P. Teroomal Row, District Munsif of Bellary, in Suit No. 76 of 1874.

The Judgment of the Court states the facts.

No Counsel were instructed.

PER CURIAM:—In this case the District Munsif asks whether a payment endorsed on a bond by direction of the obligor, who cannot write, and signed with his mark, is an acknowledgment in writing within the meaning of Section XX of Act IX of 1871. (b)

The High Court are clearly of opinion that it is.

(a) Present:—Morgan, C. J. and Holloway, J.

(b) The portion of the Section which applies in this case is as follows:—"No promise or acknowledgment in respect of a debt or legacy "shall take the case out of the operation of this Act, unless such "promise or acknowledgment is contained in some writing signed, "before the expiration of the prescribed period, by the party to "be charged therewith or by his agent specially authorised in this "behalf."

Appellate Jurisdiction. (a)

Referred Case No. 10 *of* 1873.

VENKATASAMI NAIK *against* SETUPATI AMBALAM.

In order to enable a landholder to maintain a suit in the Civil Courts for rent where Madras Act VIII of 1865 requires that puttahs should be tendered, such tender must be made within the Fasli for which rent is sought to be recovered.

THIS was a case referred for the opinion of the High Court by P. P. Hutchins, Acting Civil Judge of Madura, in Appeal Suit No. 184 of 1872. 1874. *May* 26. *R. C. No.* 10 *of* 1873.

The suit was brought by the lessee of the Shivaganga Zemindári against a ryot for rent and was dismissed by the Munsif on the ground that a pattah had not been tendered within the Fasli for which rent was claimed. The District Judge referred the question :—Is a suit for rent, brought by a landholder who is bound to give or tender pattahs by Madras Act VIII of 1865, barred if the tender has taken place after the expiration of the Fusli and after a reasonable time has elapsed since its expiration, but within the three years allowed by Clause, 1 Section 8 of Act XIV of 1859? In this case tender was made after the expiration of the Fasli, but within the period prescribed by the Limitation Act for suits for rent.

O'Sullivan for the plaintiff.

The Court delivered the following

JUDGMENT :—According to the opinion of a majority of the Full Bench (b) a landholder is bound to give or tender a pattah within the Fasli.

Appellate Jurisdiction (c)

Special Appeal No. 279 *of* 1874.

KUMARASAMY REDDI... .... *Special Appellant.*

PANNA SOONA MOOROOGAPPA CHETTY. *Special Respondent.*

The plaintiff purchased certain property from the 1st and 2nd defendants. The property was subsequently put up for sale by order of the Civil Court in execution of a decree against the 1st and 2nd defendants and was purchased by the 3rd defendant. When the property was about to

(a) Present :—Morgan, C. J. and Kindersley, J.

(b) See ante page. 313.

(c) Present—Innes and Kinderaly, J J.

be sold under the decree the plaintiff presented to the Court a petition objecting to the sale, but his Vakil withdrew the petition with his consent before the sale. In a suit by the plaintiff for the recovery of the land.

Held that the plaintiff was not precluded from recovering the land by reason of his having withdrawn the petition.

1874. *June* 3. *S. A. No.* 279 *of* 1874.

THIS was a Special Appeal from the decree of F. C. Carr, the District Judge of Tinnevelly in Appeal Suit No. 566 of 1872, reversing the decree of the Court of the Principal Sadr Amin of Tinnevelly in Original Suit No. 308 of 1871.

Scharlieb for the special appellant, the plaintiff.

Shephard for the special respondent, the 3rd defendant.

The Court delivered the following

JUDGMENT :—Plaintiff sued to recover certain landed property which had been sold to him by 1st and 2nd defendants on the 26th June 1870, but which had been put up to auction and sold by order of the Court in execution of the decree against 1st and 2nd defendants in Original Suit No. 9 of 1870.

The present 3rd defendant was the decree-holder in that suit and became the purchaser. The property was not put up to sale by the Court till some date in December 1870, subsequent to sale to plaintiff by 1st and 2nd defendants.

The land had been attached before judgment in the suit, but at a date subsequent to that of the sale to plaintiff, and the Courts below have found that there is no ground for suspecting that the sale to plaintiff was other than a real *bonâ fide* sale.

When plaintiff became aware after decree that it was intended to sell the property under the attachment obtained before judgment, he put in an objecting petition, which, it is found by the Lower Appellate Court, was afterwards withdrawn by plaintiff's Vakil with his consent.

The District Judge considered that the withdrawal of the objection amounted to a consent on plaintiff's part to the sale of the land and that he was therefore not entitled to bring this suit.

1874. *June* 3. *S. A. No.* 279 *of* 1874.

This is the only question fairly before us in the Special Appeal, and we are clearly of opinion that the view taken by the District Judge is wrong. Had plaintiff not formally objected to the sale, no doubt could be entertained of his right to institute a suit to enforce as against the purchaser at the Court sale the prior sale to him by 1st and 2nd defendants; and the making and afterwards withdrawing the objection can have no greater effect than would have followed the abstaining from making it. What happened was that the sale took place and 3rd defendant purchased the right, title and interest of the 1st and 2nd defendants, and from the finding as to the sale to plaintiff it follows that, in so doing, he took no title, as the title was already vested in plaintiff.

We concur in the judgment of the Principal Sadr Amin that plaintiff is entitled to recover the property from the 3rd defendant, and we must reverse the decree of the District Judge and restore that of the Principal Sadr Amin.

The 3rd defendant will pay the costs throughout.

Appeal allowed.

Appellate Jurisdiction. (a)

Referred Case No. 17 *of* 1874.

CHINNA PERUMAL NAICKER,

against

ANNAMMAL AND ANOTHER.

A Promissory note upon a one anna stamp dated in August 1870 provided for the repayment of the amount mentioned in it on or before the 12th July 1871. In a suit upon the promissory note, *Held* that it was not receivable in evidence upon payment of a penalty.

1874, *June* 17. *R. C. No.* 17 *of* 1874.

THIS was a Case Referred for the opinion of the High Court by A. Annoosamy, the Subordinate Judge of Tinnevelly, in Suit No. 1,778 of 1873.

(a) Present:—Morgan, C. J., Holloway and Innes, J J.

1874. June 17. R. C. No. 17 of 1874.

The following is the statement of the case.

"The suit was brought for the recovery of Rupees 148-2-8 under a Promissory note, dated in August 1870, passed by Manthira Murthi (the deceased husband of 1st defendant and brother of the 2nd). The note is on a one anna stamp and provides for repayment of the money by the 12th July 1871.

The 2nd defendant's Counsel objected to the reception of the Promissory note in evidence on the ground of its not being engrossed on a two annas stamp under Section 1 Schedule I, Act XVIII of 1869, and therefore not being receivable in evidence under Section 28 of the Act.

Section 28 seems to me to apply to a Bill of Exchange, or Promissory note, or other instruments chargeable with the duty of one anna, but as the note now in question requires a stamp of two annas, the Section is not in point, and I think the note is receivable on payment of the deficient stamp duty and penalty under Section 20.

The question for the decision of the High Court is whether the said Promissory note is receivable under the stamp law on payment of the deficient stamp duty and penalty.(a)

(a) The following are the provisions of the General Stamp Act (XVIII of 1869) which bear upon the question :—

Section 8. "The holder of any bill of exchange or promissory note "drawn or made out of British India, and not stamped as required by "this Act, shall, before he presents the same for acceptance or for pay- "ment or endorses, transfers, or otherwise negotiates, such bill or note, "affix thereto the proper adhesive stamp or stamps for denoting the duty "with which it is chargeable under this Act."

Section 19. "Subject to the provisions contained in Section 26 no "person taking a bill of exchange or promissory note requiring a stamp "under Section 8, either in payment or as a security, or by purchase or "otherwise, shall be entitled to recover thereon or to make the same "available for any purpose, unless at the time when he so takes it, the "proper stamp is affixed thereto and cancelled in manner directed by "this Act."

Section 20. "When any instrument chargeable with stamp duty "executed on paper not bearing the stamp required by the law in force in "British India at the time of its execution is produced in a Civil Court, "the Court, if satisfied that the omission to execute such instrument on "paper bearing the proper stamp did not arise out of any intention to "evade payment of the proper duty, and on payment of such duty, or, in "the case of an insufficiently stamped instrument, of the sum required to "make up the full amount chargeable on such instrument together with "a penalty."

* * * * *

No Counsel were instructed.

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of 1874.

The Court delivered the following Judgments :—

INNES, J. :—The words "chargeable hereunder with the duty of one anna" in Section 28 are not intended to qualify the words "any bill of exchange or promissory note." The result is that Sections 20 and 24 are inapplicable not only to bills of exchange and promissory notes chargeable with a duty of one anna, but to all bills of exchange and promissory notes. Such instruments after execution can only be stamped, if at all, under the provisions of Sections 8 and 26.

The present Act in this respect follows the provisions of its predecessor, Act X of 1862, and the policy of stamp Acts in general with reference to bills of exchange. The Court, therefore, cannot admit the instrument under Section 20.

HOLLOWAY, J. :—The point has been already decided in Referred Case No. 7 of 1874.(*a*)

"Shall certify by endorsement on such instrument that the proper "stamp duty has been levied thereon * * "Such certificate shall be conclusive evidence as to the amount of stamp "duty leviable on such instrument, and the said instrument shall thereupon be admissible as if originally executed on paper bearing the "proper stamp."

"Section 26 (*a*). When any bill of exchange, promissory note, cheque, "or order for the payment of money on demand by any banker or person "acting as a banker chargeable hereunder with the duty of one anna "comes to his hands unstamped, he may affix thereto the necessary "adhesive stamp and cancel the same in the manner required by this Act."

Section 28. "Except as provided in Sections 8 and 26 no "stamp shall be affixed to or impressed on any bill of exchange "or promissory note or any instrument chargeable hereunder with "duty of one anna subsequent to the execution thereof, nor shall the "provisions of Section 20 apply to any such instrument."

(*a*) Not Reported.

Appellate Jurisdiction. (a)

Special Appeal No. 304 *of* 1874.

ROBERT HODGES PIERCE and another.... *Special Appellants.*

[illegible] GANAPATHY............ *Special Respondent.*

[illegible] plaintiffs to recover damages from the defendant, a [illegible] act to deliver coffee to the plaintiffs, the plaint did not [illegible] gness of the plaintiffs to pay on delivery.

[illegible] on special appeal that such allegation was not necessary, its absence not having prejudiced the defendant.

The plaint alleged a contract to deliver on the 2nd March, and the evidence showed an extension of the time to the 31st March, but the pleadings alleged that the breach was on the 2nd March.

Held that this objection was not tenable, the defendant having been perfectly aware of the case he had to meet on this point.

The surety had begun to perform the duty which the principal had contracted to perform. *Held* that this circumstance did not preclude the plaintiffs from suing the defendant as surety.

1874. *June* 17. *S. A. No.* 304 *of* 1874.

THIS was a Special Appeal against the decision of G. R. Sharpe, the District Judge of South Malabar, in Regular Appeal No. 1 of 1874, confirming the decree of the Subordinate Court of Cochin in Original Suit No. 30 of 1873.

This suit was brought to recover Rupees 4,866-11-9 as the amount of principal and interest due on Rupees 4,679-8-9, alleged to be the extent of damages caused by the default of Opendra Chetty, Paradasy Chetty, who, on the 2nd December 1872, had entered into a contract with plaintiffs to deliver 1,000 hundred weights of native coffee to them within the 2nd March 1873 at Rupees 31 per hundred weight, and which contract plaintiffs had accepted upon defendant's guarantee, plaintiffs in consequence of the default having been compelled to purchase native coffee at the Tellicherry market at higher prices.

Defendant admitted the contract entered into by Paradasy Chetty, and stated that he (defendant) stood answerable, not as alleged in the plant, but merely for Rupees 5,000 which were advanced to Paradasy Chetty, and for the penalty provided for by the contract in case of Paradasy Chetty's failure to fulfil the contract; that plaintiffs subsequently superseded the said contract by abstaining from having any dealing with Paradasy Chetty, and both the contract and the guarantee relied on had consequently become null and

(a) Present:—Holloway and Kernan, J J.

1874.
June 17.
S. A. No. 304
of 1874.

void; that plaintiff's agent told defendant that they would give him advances of money according as the same might be required for procuring coffee, and also time till the 31st March, and that if he delivered the coffee agreed for at the stipulated rate, the coffee already delivered would be carried to his credit, and the money already received carried to his debit in the account, and he fully agreed thereto, but in the verbal contract there was no agreement that he would be liable to any damage in the event of a failure on his part to deliver the coffee which he had thus undertaken to deliver to plaintiffs.

The following is taken from the judgment of the Subordinate Judge :—At the first hearing of the suit the plaintiffs admitted certain facts affirmed by the defendant, namely, that he was allowed time till the 31st March 1873, to deliver the full quantity of coffee deliverable under Paradasy Chetti's contract dated the 2nd December 1873; that, on the 11th March 1873, the defendant applied to plaintiff's agent for an advance of Rupees 8,000 and the same was not given; that the advances made by the plaintiffs on account of the contract for the delivery of coffee amounted to Rupees 17,000, and that they told the defendant that they did not want the coffee delivered by the defendant on the 19th February and the 11th March 1873. The plaintiffs admitted also that an error had crept into the plaint by Rupees 59-6-0 expended seizing the coffee having been added to the amount claimed, and that the same must be struck out. On the other hand, the defendant admitted a certain fact affirmed by the plaintiffs, namely that the plaintiffs defrayed expenses to the amount of Rupees 122-14-8 on account of defendant for discount, sewing bags, garbling coffee, boat and cooly hire, &c. Several issues were settled, the first of which was whether subsequently to the date of the contract A, and in the same month of December the plaintiffs' agent verbally agreed with the defendant to make advances of money to the defendant according as the same might be required for procuring the coffee. Several other issues were settled and on the result the Subordinate Judge gave judgment for the plaintiffs for Rupees 108-10-0.

1874. June 17, S. A. No. 304 of 1874.

The plaintiffs appealed to the District Court.

The following is extracted from the judgment of the Appellate Court:—

"The contract sued on stipulated for the delivery of goods and for the payment thereof on delivery, and in such circumstances our Contract Act (Section 51) provides that the one party need not deliver unless the other party is ready and willing to pay on delivery. It was incumbent, therefore, on plaintiffs to aver a readiness to perform their part of the contract by stating that they were ready and willing to pay on delivery, and consequently their plaint which contains no such averment must be held to be insufficient. I need quote no precedent to show that this would be so in cases governed by purely English law, and there is the authority of the Privy Council (II Bengal Law Reports, 42) for saying that the same rule must prevail in our Courts even in cases between natives.

In strictness my judgment should stop here, but, as I have looked into the record, I may as well also express an opinion upon the objection raised by defendant as to plaintiff's title to recover irrespective of the above defect.

Now the plaint alleges a contract for the delivery of coffee on or before the 2nd day of March, and also states that "the cause of action arose on that date by defendant failing to perform his contract of guarantee." But how stand the facts on their own admission and evidence? There is actually their own confession that the time for delivery was extended up to 31st March, and I have not been able to obtain any information how under such circumstances their right to sue can have accrued earlier than such date. Our Contract Act (Section 62) expressly excuses the performance of the original contract where the parties have agreed to substitute a new contract for it, or to rescind or alter it, and plaintiffs having elected to extend the time are not now at liberty to recede therefrom. Into the thorny question of whether an extension of time constitutes a new contract, it is not necessary for me to penetrate. I am content to say that it certainly amounts to a variation of it,

as illustration E to Section 133 of the Contract Act is sufficient authority to shew. Further, even if it were necessary for defendant to show the substitution of a new contract, it appears to me that plaintiff's own witnesses, the correspondence on record and the counterfoils of their cheques would abundantly shew that Paradasy Chetti was allowed to drop out of the matter altogether, and that plaintiffs, while the ink of the original contract was hardly dry, commenced to treat defendant as the principal debtor and not as a mere surety, in which latter capacity alone does he appear in the contract on which plaintiffs have chosen to base this suit.

It follows that in my opinion the judgment of the Lower Court has by no means given plaintiffs *less* than they were entitled to upon the present defective plaint, (which notwithstanding my objections during the argument no offer has been made to amend), and I think that in giving them so much the Subordinate Judge has run counter to the judgment of the Privy Council (1 Bengal 396) and has permitted "a new case to be brought forward which was not set up or hinted at in the plaint."

I affirm the decree of the Lower Court and dismiss this appeal with costs.

Plaintiffs specially appealed upon the following grounds:—

The District Judge erred in saying that the plaint is defective for want of an averment by the plaintiffs of their readiness and willingness to pay for the coffee on delivery.

The District Judge erred in saying that the original contract was avoided by the extension of the time for its performance.

The District Judge erred in supposing that the contract was with defendant as a principal and not as a surety.

J. H. S. Branson, for the special appellants, the plaintiffs.

Scharlieb for the special respondent, the defendant.

The Court delivered the following

JUDGMENT:—We feel it necessary to remit this case for a judgment upon the merits.

1874. June 17. S. A. No. 304 of 1874.

The first ground of the Civil Judge for refusing such a judgment is that there is no allegation of the willingness of the plaintiffs to pay on delivery. The plaint would have been more correctly framed if it had alleged the fulfilment of all conditions, the happening of all things and the lapse of all times entitling to the delivery. Such general statement would have been quite sufficient even in Westminster Hall. Its absence has in no way prejudiced the defendant, who has raised many matters which would be a traverse of such an allegation if it had been made.

The second ground is that the plaint alleges a contract to deliver by the 2nd March, and the evidence is that there was an extension of the time for delivery to the 31st March, and that the evidence, therefore, applies to a case not made by the pleadings which allege the breach on the 2nd March.

If this original agreement with the altered time had been regularly pleaded as a substituted contract under the law of England, the alteration in point of time would have been fatal to the action, (*Taylor* v. *Henry*).

The result now would be an amendment upon terms, and in this case complete justice will be done if the case is considered on the footing of the date being the 31st March. The amendment might have been made at the time but no possible injustice can accrue, for the defendant was perfectly aware of the case which on this point he has to meet.

The treatment of the surety as principal debtor is the third objection. We are unable to see that this was done. He himself at once began to perform that for the non-performance of which he had rendered himself liable. He was quite at liberty to do so and his liability for non-performance cannot be altered by his having done so. The case must be remitted for judgment upon the issues joined between the parties. The costs of this appeal will be provided for in the revised decree.

Appellate Jurisdiction (a)

Special Appeal No. 372 *of* 1874.

PESTONJEE NESSERWANJEE BOTTLEWALLAH. } *Special Appellant.*

GOOL MAHOMED SAHIB and another...*Special Respondents.*

A Special authority is required to empower a Mercantile agent to draw or endorse bills and notes, but the authority may be implied from circumstances.

Where the act of the agent has been communicated to and ratified by the principal it becomes the act of the principal in point of law.

1874. *July* 1. *S A. No.* 372 *of* 1874.

THIS was a Special Appeal against the decision of J. R. Cockrerell, the Judicial Commissioner, Neilgherries, in Regular Appeal No. 3 of 1874, reversing the Decree of the Assistant Judicial Commissioner's Court at Ootacamund in Original Suit No. 53 of 1873.

The suit was brought to recover rupees 2,000 on two promissory notes with interest from the 17th May 1873, the date on which the notes became payable. The defendant answered that the notes were drawn by his agent, and that the agent had no authority to draw such notes, that the notes were the result of a fraudulent arrangement between the agent and plaintiffs, and that the notes were without consideration. The Acting Assistnt Judicial Commissioner gave judgment for defendant on the ground that the agent was agent by a power of attorney, and that powers of attorney do not convey authority to draw promissory notes.

The plaintiffs appealed to the Judicial Commissioner who delivered the following Judgment :—

" The facts are these,—Mr. Barboza for more than seven years was agent for defendant in defendant's shop in Ootacamund ; at all events subsequent to December 1870, he acted under a power of attorney drawn in ample terms. Defendant's firm were auctioneers as well as sellers of goods on their own account. From the record in the suit it is clear that, in February 1873, defendant's firm owed Gool Mahomed & Co. more than 2,000 rupees on an old account and for goods sold at recent auctions. It is contended that in the old account are items of personal debts contracted in Gool Mahomed's shop by

(a) Present :—Holloway and Kindersley, J J.

1874, July 1. S. A. No. 372 of 1874.

Barboza amounting to rupees 843. These items however are chiefly of old date going back to 1868, and the circumstances indicate that if they existed defendant took them on his own shoulders. The auctions were held in December 1872, and in the succeeding month. There is a rule in defendant's firm in the following terms :—

" Account sales of goods sold on commission or by auction will be rendered within one month from the date of sale, and the amount in each case paid and settled generally within three months from such date, but this term is subject to the proviso that when owners require cash Messrs. Framjee & Co. will make special arrangements to pay them at a discount when practicable." On the 13th February 1873, defendant's Agent Barboza gave Gool Mahomed & Co. the promissory notes in issue. As soon as he had drawn the notes he must have written to defendant at Madras telling him so, for a reply (H) from defendant is put in which can bear no other construction since it says " I note you have settled with Gool, Stanes and Gopaul. Defendant pleads he lost the letter of Barboza to him. These are the facts, and to my mind they disclose that whether or not the power of attorney gave Barboza authority generally to issue promissory notes for defendant's firm, a point it is not necessary to decide, the defendant condoned Barboza's action with regard to the present notes by his letter H, and must be held liable for them. Defendant pleads that Barboza at all events included in the notes his own debts to Gool Mahomed & Co. The reply, namely, that circumstances indicate defendant long ago took these debts on his own shoulders, has been stated above. But I am not satisfied that Barboza's debts are included in the notes. I discovered no certain traces of such inclusion and I see no traces of fraud whatever. Barboza was acting as agent for defendant for years. In the middle of 1873 there was a quarrel and Barboza left. Defendant now denies that Barboza's acts while he was in terms with him are straightforward and tenable, and Barboza has come forward in the present suit to back up defendant by admitting that part of the sums included in the promissory notes were personal debts to Gool Mahomed & Co, but Bar-

boza's mere statement does not produce a satisfactory belief that Barboza's evidence is more than an after thought.

1874. July 1. S.A. No. 372 of 1874.

The decree below will be reversed, and plaintiffs will take a decree for 2,000 rupees with all costs throughout. Tho promissory notes will not carry interest."

The defendant appealed specially to the High Court for the following reasons :—

The defendant is not under the circumstances of this case liable to plaintiff upon the two promissory notes sued on.

Mr. Barboza had no authority to make the two promissory notes sued on so as to bind defendant.

The original Court having dismissed the suit on the ground that Mr. Barboza had no authority to make the two promissory notes so as to bind defendant, there has been no trial or judgment on the remaining issues in this case.

The liability of the third defendant Mr. Barboza on his own private account to plaintiff could not properly form, or be made part of, the alleged consideration for the notes in question.

Miller for the special appellant, the defendant.

The Court delivered the following

JUDGMENT :—In accordance with the law of nearly all countries, the law of England requires special authority to empower a mercantile agent to draw or endorse bills and notes. A power of attorney in the widest terms omitting this special authority will not do. (*Hogg* v. *Snaith,* 1 Taunt. and a long string of subsequent cases.)

The authority may be implied from circumstances (*Edmonds* v. *Bushell,* L. R. 1 Q. B. 97). This implication would, however, be almost impossible in favour of a person cognizant of the existence of the express power under which the agent was acting. If the case, therefore, had turned upon the terms of the power, we should have agreed with the Assistant Commissioner.

Here, however, the Civil judge has found upon evidence before him that this Act done in the name of the principal

1874. July 1. S. A. No. 372 of 1874.

was communicated to and ratified by him. He has therefore become in point of law the maker of the note and is entitled only to such defences upon the record as are available to such maker. That defence is fraud and partial failure of consideration. They are both based on the same allegation that the agent paid a debt, partially his principal's and partially his own, by the making of this note. The proof of this failure of a divisible and definite part of the consideration lay upon the defendant and the Civil judge has found upon the conflict of evidence that it is not made out, the Special Appeal must therefore be dismissed.

Appellate Jurisdiction. (a)

Special Appeal No. 65 of 1874.

NARAINA PUTTER...............*Special Appellant.*
AYA PUTTER....................*Special Respondent.*

The plaintiff executed a document whereby he created a charge of Rs. 4,500 upon certain immovable property. In a suit to cancel the document upon the ground of fraud.

Held that the plaintiff valued his relief at Rs. 4,500, and that the District Munsif had no jurisdiction to try the suit.

1874. July 2. S. A. No. 65 of 1874.

THIS was a Special Appeal against the decision of G. R. Sharpe, the District Judge of South Malabar, in Regular Appeal No. 437 of 1873, confirming the decree of the Court of the District Munsif of Temelprom in Original Suit No. 274 of 1873.

The plaint stated that the suit was brought to cancel a document whereby a Karipanayom Karar right of 4,500 rupees was created on certain lands specified in the Schedule annexed to the plaint upon the ground that the plaintiff was induced to sign the document by the fraud and misrepresentation of the defendant, and that possession of the document was fraudulently obtained by the defendant from the plaintiff.

The plaint set forth that the property specified in the document was in the joint possession of the plaintiff and his daughter-in-law, that defendant, a nephew of the plaintiff,

(a) Present:—Morgan, C. J., and Holloway, J.

1874. July 2. S. A. No. 65 of 1874.

represented to him that he would settle the difference which then existed between him (plaintiff) and his daugher-in-law if he executed a document, the contents whereof were not explained to him. Plaintiff complied, but on learning the truth laid his complaint before the Registrar and Magistrate but without effect.

The defendant contended that he obtained the document legally for adequate consideration, and that the District Munsif's Court had no jurisdiction to try the suit.

The following issues were settled:—

I.—Whether the suit was properly valued.

II.—Whether defendant obtained the document without plaintiff's full knowledge of the facts and through fraud.

The Judgment of the District Munsif upon the first issue was as follows :—

The questions for decision are (1) whether the suit ought to be valued, for the purpose of jurisdiction, upon the sum secured by the document sought to be cancelled or upon the land revenue payable upon the property, the subject of the transaction ; and (2) whether institution fee ought to be paid or rupees 4,500.

With regard to the 1st question, land is the subject of the suit, for the document in question does not hold plaintiff personally responsible for the debt. I hold, therefore, that the suit was properly valued upon the revenue; and the value thus assessed falls within the pecuniary jurisdiction of this Court.

With regard to the 2nd question, plaintiff merely seeks for a declaration and wants no consequential relief; in such cases rupees 10 would be the proper institution fee; but plaintiff has paid more and does not wish for a refund of the difference.

I find the 1st issue for plaintiff.

The District Munsif also found the second issue for the plaintiff and decreed that the document was null and void and should be cancelled. Upon appeal to the District Court by the defendant the contention as to the jurisdiction of the

1874. *July* 2. *S. A. No.* 65 *of* 1874.

District Munsif was not relied upon and the District Judge confirmed the decree of the District Munsif.

The defendant appealed specially to the High Court upon the following grounds :—

The District Munsif had not jurisdiction to try this suit.

The judgments of the Lower Courts do not set out sufficient evidence to justify the decrees given.

Rama Rau for the special appellant, the defendant.

J. H. S. Branson for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—We are of opinion that the amount at which plaintiff within the meaning of the Act has valued his relief in this suit is Rupees 4,500. He executed a document of legal validity, which created a charge of this amount, and when it is cancelled he, by the operation of the Court, became richer by that amount. We apprehend that such a consequence is relief of a very substantial description and very far from being a mere declaration. It is as much a suit to get rid of a charge as a suit for the redemption of a mortgage and with the distinction that in this case the Plaintiff does not become richer by the amount for he pays off the charge and is economically where he was before, while in the present case he becomes richer by the removal of a burden legally created and manifestly to the extent of that burden. (Section 7 Clause 9). (*a*)

It seems clear that the Munsif had no jurisdiction and this is an objection which could not be waived. On this ground we reverse the decrees of the lower Courts and dismiss the Original Suit with costs.

(*a*) Clause 9 Section 7 of the Court Fees Act (Act No. VII of 1870) is in these words :—

"In suits against a mortgagee for the recovery of the property mortgaged and in suits by a mortgagee to foreclose the mortgage or, where the mortgage is made by conditional sale, to have the sale declared absolute according to the principal money expressed to be secured by the instrument of mortgage."

Appellate Jurisdiction. (a)

Criminal Regular Appeal No. 352 *of* 1873.

NOUJAN.......................................*Appellant.*

A prisoner, tried, convicted and punished under Section 369 of the Indian Penal Code of abducting a child with intent dishonestly to take moveable property, cannot also be punished for the theft of a part of the moveable property which he intended dishonestly to take through means of the abduction; and the second punishment for a theft is by the present Code of Criminal Procedure illegal.

THIS was an Appeal against the sentence of the Court of North Tanjore in Case No. 55 of the Calendar for 1872. 1874. *July* 8. *C. R. A. No.* 352 *of* 1873.

The Government Pleader in support of the conviction.

No Counsel were instructed for the Appellant.

The facts are sufficiently set forth in the following

JUDGMENT:—The immediate question is whether a prisoner tried convicted and punished under Section 369(*b*) of abducting a child with intent dishonestly to take moveable property can also be punished for the theft of a part of the moveable property, which he intended dishonestly to take through means of the abduction.

Save for the new Code, this course would be illegal under the repeated decisions of this Court.

454. I(*c*) is the section by which this process is to be supported, if at all. If the words of this branch are taken in connexion with those of 452, which precedes it, and of branches II, and III, they do not do so. 452 contains a rule of criminal pleading as to the necessity of a separate charge and a separate trial for each distinct offence. Then 453 (similarly to the English rule as to several embezzle ments) modifies this rule as to offences of the same kind committed within a year. The pre-requisites of joinder are similarity of the offences and their falling within the time. Then, strangely

(*a*) Present:—Morgan, C. J. and Holloway, J.

(*b*.) Section 369 of the Penal Code is as follows:—"Whoever kidnaps "or abducts any child under the age of ten years, with the intention of "taking dishonestly any moveable property from the person of such child, "shall be punished with imprisonment of either description which may "extend to seven years, and shall also be liable to fine."

(*c*.) The Sections of the Code of Criminal Procedure (Act X of 1872) which bear upon the question decided in this case are Sections 452 to 456 both inclusive.

1874. July 8 C. R. A. No. 352 of 1873.

enough, Section 455 is quoted as the key to the similarity, and the result seems to be that they are similar when it is doubtful to which of them the proveable facts in each may amount. It can, we suppose, scarcely be meant that the element of doubt is to be the governing point. It perhaps means that where, as in the illustration, the criminative facts, which constitute the offence, are so nicely shaded that it is often doubtful *prima facie* to which specific definition the facts are to be subsumed, there may be a joint trial.

A further modification of the rule of severance is introduced in 454. I. Where facts "so united as to form the same transaction" fulfil the requisites of the definitions of several offences there may be one charge and one trial. Nothing here is said about the punishment and we have still a mere rule of criminal pleading modifying the general rule.

It is not until we come to the illustrations that we find punishment imported, and with the exception of (c and d) it may perhaps be said that the offences are all different in character. Those are mere transcripts of decided cases which seem inconsistent with the principles of others decided by the same Court. (e.) is perhaps reconcileable if the kidnapping was for a different purpose, but if the kidnapping was for the purpose of subjecting to slavery, it will be impossible to reconcile it with other decisions and with the subsequent parts of this section.

(b) embraces the case of three murders and the legal principle is sound, though perhaps the application in practice will be found difficult.

If we take the section there is, therefore, nothing to overrule the previous decisions, but undoubtedly the kidnapping illustration is opposed to former decisions and unless explained as above is a direct authority for the two sentences passed in the present case.

If, however, we are to import the illustrations as a gloss upon I. and as explanatory of its meaning, we must perform the like operation upon III. and must if possible reconcile all the three parts of the section.

III says that where several facts aggregated form one offence and if served constitute several, the offender may be charged with every offence committed but the utmost punishment awardable is the extreme punishment for the concrete or for one of the separate offences. We presume that the Court may elect whether it will punish for the one or the other but it may not punish for both.

1874. *July 8.* *C. R. A. No.* 352 *of* 1873.

Now the words of the section do not meet the case. Kidnapping with intent to steal is not an offence formed by the union of kidnapping with stealing but by the union of kidnapping with intent to do it, and the result on the mere words would be that the section contains no inhibition of two punishments.

The illustrations however show that the framers imagine that they had provided for the further case of the second offence being the substantive criminal act which was the aim of the intention in the former and therefore evidentiary matter of that intent. Thus (n.) housebreaking with intent to commit adultery and the commission of it may not be separately punished. Still nearer to the present case is (p.) The enticing away (it does not even say for the purpose of committing adultery) and adultery may not be separately punished. The measure of the punishment is here again the largest amount awardable for one of the offences.

The section therefore with its illustrations forbid two punishments for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute that other. It is not narrowed to offences of a cognate character, for housebreaking and adultery have no more connexion than kidnapping and theft. We come to the conclusion therefore that, despite the inaptness of the words, there is nothing in these sections intended to alter the law, that, unless the illustrations are looked at, there is nothing to alter the principles upon which punishments were awarded before the Act passed, and that when they are all taken together those attached to a branch which does introduce a limitation upon the power of punishment must prevail over those attached to what is by itself a mere rule as to the joinder of charges.

1874. July 8. C. R. A. No. 352 of 1873.

Read I and II together, they come to this,—you may join them, but if when joined several make up one compound offence, you shall only punish for one. They shall be considered to make up such a compound, when one of them is the criminal result at which the other has arrived. You may then punish to the extent permissible for any one of them, but you shall not tack the punishments together.

In our opinion this second punishment for the theft is by the present Code as it was by a long course of previous decisions, which the Code is professing to follow, absolutely illegal. It must therefore be quashed.

We doubt whether, on this evidence, there could properly have been a conviction for simple kidnapping. It is the very subsequent theft which shewed the act not to be a perfectly innocent one, stamped it with its criminal character, and shewed by the completed act that there was abduction with the intent which that act executed.

Appellate Jurisdiction. (a)

Special Appeal No. 378 *of* 1874.

PUDISHARY KRISHNEN NUMBUDRY AND ANOTHER ... *Special Appellants.*

KARAMPALLY KUNHUNNI KURUP. ... *Special Respondent.*

The plaintiff, under threat of a criminal prosecution for the offence of criminal trespass, executed an agreement in writing which conferred certain rights on the defendant. There was no foundation for the charge made by the defendant.

In a suit to set aside the agreement. *Held* that the plaintiff was entitled to maintain the suit.

1874. July 8. S. A. No. 378 of 1874.

THIS was a Special Appeal against the decision of J. K. Ramen Nair, the Subordinate Judge of South Malabar, in Regular Appeal No. 225 of 1873, reversing the decree of the Court of the District Munsif of Calicut in Original Suit No. 434 of 1872.

This suit was brought for a declaration that plaintiffs and their father, 2nd defendant are the uralers of a temple

(a) Present :—Holloway, and Innes, J. J.

called Kakat Chitram, and that 1st defendant had no right to the temple or to the property appertaining to it. Plaintiffs prayed also for the cancelment of an agreement executed by them and 2nd defendant to 1st defendant on 26th June 1872, on the ground that it was executed by them without consideration and on account of undue influence and coercion used by 1st defendant.

The 1st defendant answered that the contract which plaintiffs sought to cancel was executed by them and 2nd defendant by their free consent and for proper consideration.

The following issues amongst others were settled :—

8th. Whether the contract executed by plaintiffs and 2nd defendant was entered into by them without their free consent as mentioned in the plaint and for illegal consideration as therein alleged.

9th. Whether, as alleged by 1st defendant, the contract was subsequently ratified by plaintiffs and 2nd defendant.

10th. Whether such ratification was for a legal consideration and was valid as alleged by 1st defendant.

The following is extracted from the Judgment of the District Munsif :— Such were the rights of the parties with respect to this temple when on 13th June 1872 plaintiffs entered the paramba on which the temple stands, felled two trees and removed a few stones of the building preparatory to renovating it. On the following day a petition was presented by 1st defendant's agent to the Taluk Magistrate charging plaintiffs and 2nd defendant with trespass and assault, and on the 18th of the same month 1st defendant himself filed a complaint against the same parties supporting the statement of his agent. It was while these charges were pending and with a view to their being withdrawn that the agreement was executed by plaintiffs and 2nd defendant.

Now an agreement to be valid must be made by the free consent of parties competent to contract for a lawful consideration and with a lawful object. Did the present agreement fulfil these conditions ? There cannot be two opinions on this

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question. The consideration and the object of the agreement was 1st defendant's forbearance to prosecute a charge of trespass and assault then pending against plaintiffs and 2nd defendant before the Sub-Magistrate. There can be no doubt that if 1st defendant, instead of preferring a criminal charge, intended to bring a civil action for the trespass and assault and the agreement was entered into by plaintiff to induce him to forego his action, the agreement would be valid. It is doubtful whether the exception in Section 214 of the Penal Code legalises the acceptance of a gratification for the sole purpose of forbearing to bring a person to legal punishment. The intention appears to me to be that where an act is committed for which the injured person has his remedy either by indictment or by action, and he elects to proceed by action and receives a consideration for the purpose of foregoing the action, he commits no offence, although the result of the compromise may be that the offender thereby escapes legal punishment. However this may be, an agreement, though not forbidden by law, would be unlawful if it is opposed to public policy.

In II, H. C. R. 187, it was held that "a contract to pay money in consideration of foregoing a criminal prosecution is opposed to public policy and will not be enforced. The consideration to support the promise on such a contract is a vicious consideration." In the English case, referred to in this decision, Tindal, Chief Justice, doubts "whether even in the case of an assault the prosecutor is at liberty to agree not to indict, although he may agree not to pursue the assaulter civilly."

Now admitting that the consideration for the agreement was lawful and that it was made with a lawful object, there remains the next essential ingredient to its validity to be considered. Whether it was made by the free consent of the parties. "Consent implies acquiescence of the mind in something proposed or affirmed." The term involves in contemplation of law the existence of a physical and moral power of assenting as well as a deliberate and free exercise of such power. Hence the absence of any of these capa-

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cities in either of the parties to a contract renders the person labouring under it incapable of binding himself thereby (Powell on Contracts). In the present case the plaintiffs and their aged father were arraigned before a Magistrate for offences which if brought home to them might deprive them not only of their liberty, but that which all Brahmins prize more than liberty, their caste. Imprisonment to a Brahmin is a terrible punishment, and the slightest possibility of incurring it is sufficient to induce them to agree to any proposal by which they may avoid it. Had plaintiffs any reasonable ground to fear this punishment ? The evidence in this case abundantly demonstrates that the fear was not groundless. Prosecuted by a man of the wealth, influence, and position of 1st defendant, who was supported by a host of witnesses (*vide* Exhibit D) ready to swear in support of the charge, he must be a brave Brahmin indeed who can retain his mind undisturbed and composed under such an ordeal and be able to resist any proposal tending to free him from his mental distress. Again 1st defendant prosecuting plaintiffs for an offence really committed is a different thing from 1st defendant prosecuting plaintiffs upon a false charge. 1st defendant no doubt was in possession of the temple and the paramba on which it stands, but he was in possession as an agent or patali. Admitting that the entry on the paramba and in the temple by the only trustees of the institution could be regarded as a trespass because they had long abstained from exercising their right of management, it is clear that their offence, if offence it be, would be so slight as not to require more than a nominal fine. But in 1st defendant's complaint care was taken to shew that the trespass was without any palliating circumstance. Plaintiffs and 2nd defendant were declared to possess no right to the temple. This was a statement which 1st defendant must have known to be false, and he further deliberately repeated this statement when examined on oath by the Magistrate (Exhibit H). It is clear therefore that 1st defendant committed an act forbidden by the Indian Penal Code to the prejudice of plaintiffs and 2nd defendant with the intention, as the event proves, of causing them to enter into this agreement. This is coercion, and

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it is abundantly clear also that there was undue influence exercised by 1st defendant over plaintiffs and their aged father, whose mind was enfeebled by mental distress from the unfounded charge brought against them to substantiate which every effort was being used. It is quite clear that but for this treatment plaintiffs and 2nd defendant would not have consented to an agreement acknowledging that valuable rights to the temple belong to the tarwad of 1st defendant, who but ten days before in their petition B. to the Superintendent of Police was declared to possess no right whatever to the temple. The suggestion of 3rd defendant's vakil that by the agreement 2nd defendant was entitled to receive about 18 parras of paddy for performing the sandi ceremony, which is double the amount formerly received by 2nd defendant, and that this was a sufficient consideration for the agreement of plaintiffs and 2nd defendant, is undeserving of any weight. It is needless to observe that 18 parras of paddy as a price for valuable rights to a temple is a consideration so grossly inadequate as to demonstrate that nothing but coercion and undue influence could have caused plaintiffs and 2nd defendant to enter into this agreement. Plaintiffs therefore have made out a sufficient case to justify this Court in cancelling an agreement which they and 2nd defendant were inveigled into executing by coercion and undue influence exercised over them by 1st defendant.

Great stress was laid by 3rd defendant's vakil on the fact that the agreement was subsequently ratified by 2nd defendant's acceptance of the increased wages allowed by the agreement and execution of a document (Exhibit 42) acknowledging receipt of the amount. Now admitting this document to be genuine, there is no evidence to show that the ratification was made deliberately after due consideration. 2nd defendant's old age, and the fact that the receipt is said to have been granted the day after the agreement, furnish the most vehement presumption that it was executed without due deliberation and before his enfeebled mind had sufficient time to recover from the effects of the treatment to which it had been subjected for many days.

I have no hesitation, therefore, in declaring the agreement invalid. It is not necessary that I should go further and make a declaratory decree as to the rights of plaintiffs and defendants to the temple and its property. Plaintiffs were aggrieved by this agreement, and this Court has given them relief by setting it aside. The parties have thus been placed in the position they occupied before the agreement. It is not expedient that plaintiffs should be placed in a better position.

Upon appeal the Subordinate Court delivered the following judgment:—

I regret that I am unable to concur with the Munsif in deeming the plaintiffs' case sustainable. The suit wss brought by plaintiffs to have their uraima right to a certain pagoda established, and also for the cancellation of an agreement by which they and their father, the 2nd defendant, have conferred on the 1st defendant half the uraima right to that pagoda and a perpetual samudayamship on the ground that it was executed by them without consideration and under duress.

Plaintiffs' uraima right to the pagoda is not only not disputed by the 1st defendant, but it was actually admitted by him before they came to Court, and moreover the 3rd defendant still admits that right. Hence the plaintiffs have no cause of action for a suit for declaration of their right.

The main object of the suit then is the cancellation of the above agreement. But the Munsif has distinctly found, and I fully agree with him in his finding, that a trespass was committed by plaintiffs and 2nd defendant on the paramba on which the pagoda stands, that the pagoda itself was forcibly entered into by them, that certain trees belonging to the pagoda were felled by them,and that all these properties have, for many years, been in the exclusive possession and under the exclusive management of the 1st defendant. The plaintiffs and the 2nd defendant were prosecuted before the Sub-Magistrate by the 1st defendant for the offence they committed, and it was during the pendency or immediately after the termination of the criminal proceedings against

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them that the agreement, of which the cancellation is here sought for, was executed by the plaintiffs and the 2nd defendant. I quite agree with the Munsif that the consideration and the object of the agreement was first defendant's forbearance to prosecute a charge of trespass and assault against them. This consideration the Munsif has correctly found to be a vicious one, and the agreement opposed to public policy. But I entertain great doubts whether under such circumstances the Munsif was right in cancelling the agreement as the instance of the plaintiffs. For the rule of law is that one of two parties to an agreement to suppress a prosecution for felony cannot maintain an action against the other for an injury arising out of the transaction in which they had thus been illegally engaged. And we have been further taught that the Indian Penal Code makes no distinction between felonies and misdemeanours. Hence a suit by either party to the agreement, by the 1st defendant to enforce it and by plaintiffs for its cancellation is, in my opinion, unsustainable. What is plaintiffs' case and prayer as stated in the plaint ? They are simply as follows. We committed a trespass on the property in the possession of the 1st defendant and assaulted his men. He prosecuted us for the offences before a Criminal Court, and to forbear that prosecution we executed to him the agreement in question. He accordingly forbore the prosecution, and we by that means escaped from legal punishment, and as we have thus gained our object, please now give us a decree cancelling that agreement. Such a request and a decree in accordance therewith is contrary to the policy of the law. I therefore reverse the Munsif's decree and dismiss the original suit, assessing each party with his own costs throughout.

The plaintiffs preferred a special appeal to the High Court for the following reasons:—

Because the plaintiffs are entitled to the declaratory decree prayed for.

Because upon the facts stated in the judgment, the plaintiffs are entitled to have the agreement in question rescinded.

Shephard, for the special appellants, the plaintiffs. 1874. *July* 8

O'Sullivan, for special respondent the 3rd defendant. *S. A. No.* 378 *of* 1874.

The Court delivered the following judgments :—

HOLLOWAY, J :—The question is whether the plaintiffs, who, without delay, applied to the Court for the setting aside of this agreement are entitled to the relief sought. The findings are that a question of right to office in a certain temple was at issue between plaintiff and the tarwads of defendant and that, for the purpose of asserting that right, the plaintiffs entered the paramba on which temple was built.

A charge of criminal trespass was immediately brought of which the result might be, and probably would be, the imprisonment and consequent civil death of these superstitious Nambudries.

They were cognizant of no nice distinctions as to the existence of a *bona fide* question of right preventing the act from amounting to criminal trespass.

Under the pressure of a prosecution threatening such consequences and to procure its withdrawal, the present agreement was executed. The Munsif has set it aside and the Sub-Judge has reversed his decree upon the doctrine of "*par delictum*" which he supposes to attach to the case and to prevent either party from taking active steps upon it. If we first take it that the transaction was a violation of law, the entering into it would be a *delictum* on both sides, and the fact that the parties were not on equal terms, that the one "holds the rod and the other bows to it" would destroy that parity and leave the question of coercion the residuum which the Court would have to consider (*Smith* v. *Bromley* 2 Doug 695, *Smith* v. *Cuff* 6 M. and S. 160-165. *Atkinson* v. *Denby* 6 H. and N. 778-792 and 7 H. and N. 934) These cases establish that in English law the rule "*ubi autem dantis accipientis turpitudo versatur non posse repeti dicimus*" will not prevent recovery where there is inequality of situation and the transaction is the result of pressure produced by that inequality. And in Roman law the rule was subject to the very marked exception that, if

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by the transaction, a crime was kept out of sight, the money paid could be recovered not by the "*condictio ob turp*'*u.n*" but by the "*condictio ob instanti causam*" (see Ulpian Dig XII 6, 2 Section 2, Code IV 7-3 quoted Voight. page 627 and 630). The cases were of bribery in a judicial matter and to avoid the obligatory military service. The case is still clearer in the English Courts of Equity. In *Williams* v. *Bayley* there is a striking example of an agreement set aside on the two grounds of trafficking in crime and the procuring of assent by the terror of the punishment of another (1 L. R. H. L. 200).

If, however, there was no delict at all, the case resolves itself into the simple one of the will overmastered by terror of consequences quite sufficient to prevent any possibility of its being self determined. It is not the case of an agreement to fulfil an already existing demand. (See Lord Cranworth in the case quoted) but a case in which both the Courts have found that the sole cause, not the mere occasion of entering into the agreement embodying matter altogether beyond the scope of mere compensation, was the well founded terror of the influence of the prosecutor and of the civil death which would probably result from his proceedings. It is useless to quote authorities for the position that such an agreement cannot possibly stand. Our books bristle with cases of relief on grounds infinitely weaker. The decree must be reversed, that of the Munsif restored and all costs paid by the defendants below.

INNES, J.—Had there been a criminal trespass, it would, I think, be difficult to say that there was coercion exercised. In that case the threat by defendant of prosecution or continued prosecution would be the threat of exercising rights which the law gave him, and this, according to the opinion of Lord Chancellor Cranworth in *Williams* v. *Bayley*, would not amount to coercion. But assuming this to be so, the agreement would amount to the stifling of a criminal prosecution for an offence which the law does not permit to be compounded, as it is eminently not an offence irrespective of intention (See exception to Sec-

tion. 214 I. P. C.), and on the ground of public policy such an agreement would be liable to be set aside notwithstanding the "*par delictum.*" 1874. *July* 8. *S. A. No.* 378 *of* 1874.

But, according to the finding of the District Munsif (and I do not see that the Sub-Judge adopts a different view) the charge of criminal trespass was false, the trespass having been committed for the purpose of asserting a right and not with any such intention as is required to constitute the offence of criminal trespass. The defendant, besides, so colored the circumstances as to render it probable that the plaintiff, if convicted, would suffer a heavier punishment than if the simple facts had been adhered to. In doing so, the defendant abused the rights which the law allowed him and the agreement was therefore, I think, rightly held by the Munsif to have been entered into by plaintiff under coercion. I concur therefore in the decree proposed.

Appellate Jurisdiction. (a)

Civil Miscellaneous Regular Appeal No. 353 *of* 1873.

KRISHNAJI KESAVA PUNDIT................*Appellant.*
SUBBARAYA TAKKER ....*Respondent.*

Where a decree has been adjusted between the parties by a contract binding upon them a Court is not bound to issue process of execution upon the original decree in violation of the terms of the contract although the decree holder refuses to certify the adjustment of the decree under Section 206 of the Code of Procedure, especially where the Court executing the decree is the Court to which the parties would go for the purpose of enforcing the contract.

THIS was a Regular Appeal against the order of F. M. Kindersley, the District Judge of South Tanjore, dated the 11th October 1873, passed on Civil Petition No. 671 of 1873. 1874. *July* 8. *C. M. R. A. No.* 353 *of* 1873.

The facts, so far as it is necessary to state then, were as follows:—The defendant in this suit (Krishnajee Kesava Pundit, got a decree in Original Suit No. 3 of 1865 in the Civil Court of Tanjore for nearly two lacs of rupees against the Senior widow of the late Rajah of Tanjore upon an agreement executed by her, promising to pay Krishnajee the amount sued for in consideration of the trouble and

(a) Present:—Holloway and Innes, J J.

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expense he might incur in recovering for her the Raj and the private estate of the late Rajah. In Original Suit No. 7 of 1868 in the same Court, Bavanisakara Josi sued Krishnajee Pundit to obtain a share of the amount recovered by Krishnajee in Original Suit No. 3 of 1865. The plaintiff in Original Suit No. 7 of 1868 alleged that he and one Nana Takker had been joint partners in the efforts made to recover the estate for the widow of the Rajah. The suit was dismissed by the Civil Judge, but upon appeal to the High Court the decision was reversed and a decree given in favour of the plaintiff. Krishnajee Pundit preferred an appeal to Her Majesty in Council, Subroya Takker, son of Sivagankar Takker and grandson of the abovementioned Nana brought Original Suit No. 15 of 1872 in the same Court against Krishnajee Pundit to recover his share. The Suit was undefended and a decree was given in favour of the plaintiff for Rupees 65,000.

On the 5th May 1873 an agreement was made between Krishnajee Pundit, Bavana Sankara Josi and Subroya Takker by which the appeal to Her Majesty in Council was withdrawn and certain arrangements made for the discharge of the two decrees then standing against Krishnajee. Subroya Takker was to receive Rupees 5000 in full satisfaction of his decree, then amounting to Rupees 67,056-9-8. The appeal to the Privy Council was accordingly withdrawn.

Notwithstanding the agreement Subraya Takker applied for execution for the full amount of his decree and Krishnajee, set up the agreement. The Civil Judge granted the application, being of opinion that he was precluded by Section 206 of the Code of Civil Procedure from taking any notice of any private adjustment of a decree not certified to the court by the decree holder; that as an alleged payment could not be taken notice of unless certified to the Court by the decree holder, so an alleged agreement to pay any fixed amount in satisfaction of the decree should be equally disregarded.(a)

(a) Section 206 of the Code of Civil Procedure is as follows :—
"All moneys payable under a decree shall be paid into the Court "whose duty it is to execute the decree, unless such Court or the Court "which passed the decree shall otherwise direct. No adjustment of a de-"cree in part or in whole shall be recognised by the Court, unless such "adjustment be made through the Court or be certified to the Court by the "person in whose favor the decree has been made or to whom it has been "transferred."

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Subraya Takker admitted the execution of the agreement, but alleged that it had never taken effect and Krishnajee himself had sought to evade it.

Krishnajee appealed to the High Court. In answer to an issue sent the District Judge found that the decree in Original Suit No. 15 of 1872 has been adjusted between the parties by a contract binding upon the parties and effective for that purpose.

Gould for the appellant.

Miller and *T. Rama Rau*, for the respondent.

The Court delivered the following

JUDGMENT:—We disposed on the last occasion of the agreement in support of the order based upon the conduct of the defendant. That conduct was, as is usual with him, slippery and unsatisfactory. He did not, however, attempt to repudiate his agreement, but moved the Court to put upon it a wholly unsustainable construction. This could in no circumstances entitle Sivasangara Takker to get out of his own part of the agreement. Still less could it do so when the Act of the defendant did not touch that part. The facts are simple and indeed undisputed. The decree against Krishnajee had been passed and was under execution. Its complete execution would have swept away all that he had. The plaintiff in the second suit, therefore, prudently came to an agreement with him in the first, and the defendant, by which he would get Rupees 5,000 down. The primary plaintiff also abandoned something and on consideration of this agreement the appeal to Her Majesty in Council was abandoned, and that abandonment and the grounds of it communicated to this Court. In pursuance of it the appeal was withdrawn. This secondary plaintiff, having reaped the full advantage of this agreement, now seeks to get the full amount of his decree as if there were no agreement, in fraud of the primary plaintiff, of the defendant who has altered his situation both by withdrawing his appeal to England by leaving unimpeached the second decree against which he would doubtless have appealed, of the Courts whose proceedings have been affected by the communica-

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tion of the arrangement and especially of the Civil Court, whose process has been grossly abused by this fraudulent conduct.

The Civil Judge would have had no doubt but for Section 206 of the Civil Procedure Code. To our mind there is no inconsistency in those who hold that an action cannot be maintained either for money voluntarily paid out of Court with a full knowledge of the facts, or under a subsisting process into Court, (3 H. C. 188) also holding that there is nothing in a mere rule of procedure to prevent a Court from setting aside a process fraudulently issued upon a decree which has been validly discharged by matter subsequent. No one could doubt that the plaintiff could have been compelled to carry out his agreement and to take all steps necessary to render it effective. The question becomes no longer one of mere procedure, but of material law, and full effect will be given to the rule of the Procedure Code if it is construed as preventing the Court from entering upon investigations of disputed payments in satisfaction. It would be going a step further to say that the Court is forbidden to enquire whether the obligation created by the decree which the process is to follow has altogether gone. The words manifestly refer to adjustments by payment, and even if any rule of procedure ought to be construed to prevent a Court from setting aside its own process on account of fraud, certainly the words should not be stretched for that purpose. Here the contract between the parties amounted to a complete release of the obligation and the creation of another. It was no performance but an extinction by novation. When it is said that fraud vitiates all proceedings, the expression points to a rule altogether outside specific rules even of material law. If there is *dolus* in the exercise of a right valid on ordinary legal rules, the Courts will restrain that exercise. If a decree subsists and so long as it subsists, by no form of ordinary legal means can the sums paid under it be recovered. When it is set aside for fraud the state of things which it has been used as the fraudulent instrument of disturbing will be restored. We see nothing more sacred in execution the accessory—than

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in a decree the principal. That fraud of the specific character there needed is a ground for impeaching a decree even of Her Majesty in Council, as it is in England of one confirmed by the House of Lords (*Regular Appeal No. 14 of* 1874) we have recently decided. Rules of procedure are applicable to all ordinary legal means, and, in such application, cannot be modified by equitable considerations ; this results from their being rules of public law. They by no means, however, exclude those extraordinary legal means which are the offspring of the principle that fraud cannot be permitted to prevail. Itself a source of rights of the widest scope, this rule is connoted by every other legal rule denoting a legal right. You have the right because the facts required to invest you with it exist, unless there has been fraud in the mode of its creation. You are normally entitled to exercise every right resident in you, and this among them, unless there are circumstances which would render its exercise a fraud.

There can be no doubt that the plaintiff could have been compelled to take every step required to effectuate the valid contract into which he had entered deliberately and with peculiar circumstances of solemnity and publicity. One of the remedies incidental to that relief would have been an injunction against executing the decree which had been discharged by the agreement valid for the purpose, because in the sense applicable to this matter, it was not yet final (VI M. H. C. 137). (*a*) The question then is, whether the defendant should be driven to a suit in the same Court to attain that remedy which, on the admitted facts of this case, must be conceded to him. If the relief were not within the jurisdiction of the same Court, it might be otherwise ; but as it is so, we are of opinion that we should not allow the plaintiff to obtain that which he would undoubtedly be compellable to return. "*Dolo facit qui petit quod redditurus est.*" The process of execution must be set aside and the parties restored to the exact condition which has been disturbed by it.

(*a*) Moparti Pitchi Naidu v. Vuppala Kondamma.

Appellate Jurisdiction. (a)

Referred Case No. 29 of 1874.

CHINNASA'MI IYENGAR *alias* STREENIVASSA RAGHAVA CHARYAR,
against
GOPA'LACHARRY.

In a suit brought after the 1st April 1873 on a promissory note for a sum payable on demand, executed while the old Limitation Act (XIV of 1859) was in force, but not barred under that Act at the time the new Limitation Act (IX of 1871) came into force, the period of limitation ought to be computed from the date of the note and not from that of the demand. The new Act merely alters the point of time, as to notes executed after its enactment, from which the period is to be reckoned, and does not make a demand a mode of extending the period of limitation.

1874. *August* 12. *R. C. No.* 29 *of* 1874.

THIS was a case referred for the opinion of the High Court by Mr. G. A. Parker, the Acting Judge of the Court of Small Causes at Cuddalore, in Summary Suit No. 73 of 1874.

The following is the case stated.

"The suit was instituted by the plaintiff for the recovery of Rupees 375, due on a promissory note alleged to be executed in his favor by defendant on January 16th, 1871. The plaint was filed on January 26th, 1874.

"The note, which is dated 'Salem, 16th January 1871,' is as follows:—'I promise to pay on demand to M. Chinnasámi Iyengar *alias* M. Streenivassa Raghava Charyar, the sum of Rupees 375 (three hundred and seventy-five) for value received.

C. Gopala Chari.'

"The defendant, a Police Inspector, pleaded that the note was a forgery, and, after evidence had been taken by Commission at Salem and in Madras, his Pleader raised the objection that the suit was barred under Act XIV of 1859, quoting, in support, the Rulings of the High Court in Referred Cases 37 and 58 of 1873, reported at pages 176 and 177 of the Madras Jurist for May 1874.

"I found upon the facts that the promissory note was executed by the defendant, and that the demand was made in December 1871, or January 1872. If, therefore, the period of Limitation is to be computed under the New Act (IX of 1871) the suit is in time.

(a) Present :—Holloway and Kindersley, J J.

1874, *August* 12. *R. C. No.* 29 *of* 1874.

"The Ruling in Referred Case 58 of 1873 (*a*) merely lays down that Act IX of 1871 does not give a new period of Limitation to a suit on a bond already barred by the old Limitation Act before the New Limitation Act came into force. In the present case, however, a suit upon the promissory note was not already barred by Act XIV of 1859 when the new Limitation Act came into force. It would not have been barred till 17th January 1874.

"Referred Case 37 of 1873 (*b*) appears to support defendant's plea; but it is argued that the ground of the Judgment in that case is, that the legal bar of Limitation had arisen prior to Act IX of 1871 coming into force, while in this case no such legal bar was completed. It is true the Judgment says that the New Act confers no right of suit founded upon a demand, 'subsequently' made, but it is argued that the word 'subsequently' refers to the date of the legal bar having arisen, and not to the date of the writing. I do not think such a construction was intended, and I think in this case, as the promissory note was executed before the passing of Act IX of 1871, that the suit is barred, but, at the request of the plaintiff's pleader, I refer the case for the decision of the High Court.

"The question submitted for the decision of the High Court is—

"Whether in a suit brought after the 1st April 1873 on a promissory note executed while the old Limitation Act (XIV of 1859) was in force, but not barred under that Act at the time the new Limitation Act came into force, the period of limitation ought to be computed under the old Limitation Act, or under Act IX of 1871?"

O'Sullivan and *Ráma Rau* for the plaintiff.

Mills for the defendant.

The Court delivered the following

JUDGMENT:—The question submitted is, whether in a suit brought after the 1st April 1873 on a promissory note for a sum payable on demand, executed while the old Limitation Act (XIV of 1859) was in force, but not barred under

(*a*) See ante p. 283.

(*b*) Ante p. 288.

1874. August 12. R. C. No 29 of 1874.

that Act at the time the new Limitation Act (IX of 1871) came into force, the period of limitation ought to be computed from the date of the note or from that of the demand.

This case differs from *Referred case No. 52 of* 1873 (a) by the circumstance that the action was not barred when the new Act came into force. The difference however does not affect the principle upon which that case was decided.

The new Act differs from the old merely as to the period at which, for the purposes of prescription, the action is to be considered born.

It does not on this point differ in any way, either as to the period of prescription itself, or as to the modes by which the period can be extended.

A demand by the creditor can have no such effect. When it was made the statute was already operating upon an action born previously to the new law coming into force, and that law could not, and did not, destroy that action for the purposes of limitation. If the new Act had made a demand a mode of extending the period the case would be different. It merely alters the point of time as to notes executed after its enactment from which the period is to be reckoned. The point of time had already been fixed by the law applicable to it and this suit is clearly barred.

Appellate Jurisdiction. (b)

Scott *v.* Scott.

In a suit for a Judicial separation and alimony, decided under the Indian Divorce Act (IV of 1869), the only basis for the estimation of pleaders' fees is ten times the amount of alimony for one year.

1874. November 20.

THIS was a case stated under Section 9, Act IV of 1869, by J. R. Cockerell, Judicial Commissioner, Nilgiris, in Suit No. 1 of 1874.

The suit was brought by a wife against her husband for a Judicial separation and alimony. The suit was decided in plaintiff's favor, she was allowed alimony at the rate of Rupees 150 a month, and the question arose as to the basis on which the pleader's fees were to be calculated.

(a) See ante p. 298.

(b) Present :—Morgan, C. J. and Holloway, J.

The Court delivered the following

1874. November 20.

JUDGMENT:—The High Court are of opinion that a suit decided under the Indian Divorce Act (IV of 1869) is clearly a suit decided on the merits.

The value of the suit, in this case ten times the amount of alimony for one year, is the only basis for the estimation of the pleader's fees, because the only one prescribed by the regulation. (a)

The case cannot be altered by a special provision of the Divorce Act authorizing a particular stamp, whatever the value.

Appellate Jurisdiction (b)

Special Appeal No. 551 *of* 1874.

SAMATHAL ... ... *Special Appellant (2nd Plff.)*

HER HIGHNESS THE MAHARAJA MATHOOSRI KAMATCHI AMMA BOYI SAIB AVERGUL and five others. } *Respondents (Defendants.)*

Where a document is, on its face, a mortgage, the right to redeem is so much an essential as not to be variable by agreement. The question of intention *extra* the document does not, therefore, arise.

1874. December 7. S. A. No. 551 of 1874.

THESE were Special Appeals against the decisions of Arunachella Iyer, the Subordinate Judge of South Tanjore, in Regular Appeals Nos. 5, 6, 7 and 8 of 1874, reversing the Decrees of the Court of the Additional District Munsif of Tanjore, in Original Suits Nos. 302, 303, 304 and 308 of 1872 respectively.

Plaintiff sought to redeem certain lands, alleged to have been mortgaged by his father to the 1st defendant's relation,

(a) Regulation XIV of 1816, Section 25, so far as it affects the case above stated, is as follows—"In all regular suits which may be instituted, either originally or in appeal, from and after the 1st day of February 1817, in any of the Zillah Courts, the Provincial Courts, or the Sadr Adálat, the Vakils employed for the respective parties are to be allowed, for pleading the causes of their clients, the rates of fees calculated as follows:—* * * * *

If the amount or value shall exceed 5,000 Rupees and shall not exceed 20,000 *Arcot* Rupees, on 5,000 as above (5 *per cent.*) and on the remainder two per cent."

(b) Present:—Morgan, C. J. and Holloway, J.

1874. December 7. S. A. No. 551 of 1874.

Mohana Avu Saib, 50 years ago. He alleged that the mortgage debt had been satisfied from the usufruct of the land, and that a surplus of Rupees 4-11-5 had accrued, which he also sought to recover, defendants 2 to 5 were included as the heirs of the person who had obtained the land on sub-mortgage, and the 6th as being in possession of the land. Plaintiff having died, his widow was included as second plaintiff.

The 1st defendant was *ex parte.*

The 4th defendant denied the mortgage alleged by plaintiff, and contended that the land, together with seven other lots, had been conveyed to Mohana Avu Saib by plaintiff's father and others, under the deed of conditional sale (marked I,) and that Mohana Avu Saib assigned her interest under II to the father of the defendants 2 to 5.

The 2nd and 5th defendants pleaded that the land was their ancestral property.

The 6th defendant contended that he was in possession of the land as lessee from defendants 2 to 5.

The issues settled were ;—

1. Is the suit barred by the Limitation Act?

2. Does the disputed land belong to plaintiff's family, or to 2nd and 5th defendants' family ?

3. Is the mortgage alleged true ?

The Munsif found that plaintiff had proved the mortgage, and that it was still a mortgage. He gave judgment allowing plaintiff to redeem the land on payment of the mortgage money, and disallowing the surplus profits.

The 2nd, 4th and 5th defendants appealed on the grounds, among others, that the plaintiff's claim was barred by the Act of Limitation, the hostile possession of the defendants having commenced in 1830.

The following is taken from the judgment of the Subordinate Judge ;—

"The questions for decision in this appeal are, whether the plaint mortgage is true, and whether the relief sought

for can be allowed upon the strength of the documents filed by defendants.

1st question.—I am of opinion that the plaint mortgage is not proved.

The 2nd question.—Defendants' (2 to 5) story as to how they acquired this land, and the lands claimed in Appeal Suit Nos. 5, 7 and 8 is, that the owners of each lot jointly conveyed the whole piece under I to Mohana Avu Saib and that Mohana Avu Saib, by virtue of I, became absolute owner, and that she conveyed her interest to their father under II. The determination of its *bonâ fides*, and a proper construction thereupon are now necessary. I is dated in 1811, and its appearance fully justifies its age. It has come from proper custody. It is besides, proved by the evidence of 1st and 3rd witnesses examined by 4th defendant, and further its genuineness was not disputed by plaintiff, but he simply stated, in his deposition, that he does not know whether the document is true or not. Its language is as follows:—
"Bhoggiandi (mortgage, &c.,) bond executed to Mathosri "Mohanaboyi Saib by the Perumal Covil Stanigams and "Mirasidars of Candiyur village mortgaging nunjah lands "dated 20th Avany of Prajothpathy."

"We hereby mortgage to you for 268 pons $8\frac{1}{2}$ fanams "$1\frac{33}{80}$ out of $6\frac{201}{320}$ karais of lands belonging to us 8 in number "in the said village which is divided into 20 Ganasaukiya-"bagam (shares), viz. $\frac{1}{4}$ of $1\frac{69}{160}$ karais belonging to Perumal "Covil Pannaikarai is mortgaged for 47 pons and 2 fanams; "$\frac{21}{160}$ of $1\frac{53}{320}$ karais belonging to Anaiya Pillai is mortgaged "for 30 pons; $\frac{19}{160}$ of $1\frac{137}{320}$ karais belonging to Chinnatambia "Pillai is mortgaged for 90 pons; $\frac{19}{320}$ of $\frac{217}{320}$ karai belonging "to Marudai Pillai is mortgaged for 5 pons and $7\frac{3}{4}$ fanams; "$\frac{67}{320}$ of $\frac{3}{80}$ karai belonging to Thonthia Pillai is mortgaged "for 61 pons; $\frac{5}{160}$ of $\frac{29}{160}$ karai belonging to Koothaperumal "Pillai is mortgaged for 3 pons; $\frac{3}{40}$ of $\frac{12}{70}$ karai belonging "to Marudanayagam Pillai is mortgaged for 16 pons and $8\frac{3}{4}$ "fanams; and $\frac{7}{80}$ of $\frac{7}{16}$ karai belonging to Iyya Pillai is "mortgaged for 15 pons. Since we have mortgaged our "lands to you as specified above, and have each received "the mortgaged amount from you, you are to enjoy in

1874. December 7. S. A. No. 551 of 1874.

"lieu of interest the aforesaid $1\frac{33}{80}$ karais with the nunja "and manaicut lands thereunto attached together with "the ground and also pallateru grounds to the extent "of 320 gulies. You are also to pay all the expenses "and render all services according to the usage on account "of those lands. You are also to pay to the Eesran Covil "and Perumal Covil the Thunduvarram at the rate of 2¼ "callams per cent. on the produce of the above said $1\frac{33}{80}$ karais. "You are to enjoy the said lands for this year and deliver "them to us in Vyasy of Angila after receiving from us the "said amount. In default of payment at the said term you "are to enjoy the said lands for four years from this date "and to give up the lands on payment by us of the mort-"gage sum in current monies in Vyasy of the year Yava. In "case we should fail to redeem the said lands from you "even on the expiration of the term last mentioned, you are "to enjoy the said $1\frac{33}{80}$ karais of land from generation to "generation and with right to dispose of the same by gift, "sale, &c., as if they were sold to you. We the Perumal "Covil Stanigams and Mirasidars of the Candiyur village do "hereby execute to you Mathasri Mohanaboyi Saib this "Boggiandi (mortgage, &c.) deed with our free will. The "writer of this mortgage bond is Panchanadam Pillai of "Candayar. When the mortgage amount is paid and the "lands redeemed each individual is to pay his share of the "amount and redeem his share of the land."

The appellant's vakil contends, and with reason, that if mortgage only had been the intention of the parties to I, the word "Boggiam" alone would have found a place therein, but as the words used are "*Boggi Andi*" (which mean Boggiam and other tenure) the parties had it in their intention to convert the mortgage into an absolute sale, if the same were not redeemed by the time fixed. I fully agree with him, and hold that Mahana Avu Saib become absolute owner of the land conveyed to her under I after the expiry of the second period allowed to the executors thereof for redemption. The absolute title acquired by the defendants' (2 to 5) father under II (which also I hold genuine) ought of course, to be upheld.

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Under the foregoing view of the case I reverse the original decree, and dismiss the suit with costs throughout."

The plaintiff preferred a special appeal on the ground, among others, that she was entitled to redeem the lands from the defendants.

Ráma Rau for the special appellants.

The *Advocate General* for the 2nd to 6th special respondents.

The Court delivered the following

JUDGMENT :—In this case the transaction is, on its face, a mortgage, and the decisions of this Court (Nalana Goundan v. Palani Goundan, II M. H. C. Rep. 420 and many others) have followed the English principle that the right to redeem is so much an essential as not to be variable by agreement. The question of intention *extra* the documents does not therefore arise.

If it did, the words of the transfer are quite as much in favor of the mere transfer of a mortgage as of a pretence to sell. The amount paid being the exact amount of the mortgage debt, and the covenant that the transferee shall defend the title, are still more so.

There is, therefore, no place for the application of the doctrine of shortened limitation in the case of *boná fide* purchasers for value.

The nature of the title is quite apparent upon the face of the documents, and *boná fides,* as applied to this matter means, without notice of the title of another.

If, therefore, there had been a sale, the section ought not to have been applied, but there is not. It is a mere transfer of all that the alienor had. We must, therefore, reverse the decree of the Lower Court, and remit the case for decision upon the footing that the transaction is a mortgage and not a sale.

The costs of this appeal will be provided for in the revised decree.

Appeal allowed and case remitted.

Appellate Jurisdiction. (a)

Regular Appeal No. 50 *of* 1874.

RAJAH MANIKYA ROW LAKSHMAYYAH. ... *Appellant.*

RAJAH MANIKYA ROW VENKATA GOPAL ROW and eight others ... ... } *Respondents.*

In 1874 plaintiff sued to recover certain property, or its value "dishonestly misappropriated" on the 21st January 1872 by 1st defendant, assisted by the other defendants. The Lower Court held that the right to sue did not accrue until the property had been demanded and refused; that the plaint contained no allegation of such demand and refusal; that the plaint could not be amended by the insertion of such an allegation after answer filed; and that, therefore, the suit could not be maintained :—

Held, reversing the decree, that even if the present case were one in which the provision as to demand could have any application at all, still the suit ought not to have been dismissed on that technical ground, when the defendant, by his answer, traversed the whole of the allegations in the plaint, and pleaded the Statute of Limitations.

1874. *August* 12. *R. A. No.* 50 *of* 1874.

THIS was a Regular Appeal against the decision of W. Wilson, the Acting District Judge of Kistna, in Original Suit No. 1 of 1874.

The plaintiff sued to recover from defendants certain jewels, &c., or their value Rupees 9,985.

1st defendant is plaintiff's step-son and was a minor when his father died on the 20th July 1869. Plaintiff was appointed guardian to the 1st defendant by the Board of Revenue by their Proceedings, No. 64, dated 5th January 1870. From the time of this appointment plaintiff was in the habit of going to Rachur where 1st defendant resided, and 1st defendant also visited and stayed with her in the fort at Rapulli. On the 16th January 1872, plaintiff went, according to custom, to Rachur to look after 1st defendant's affairs, 1st defendant remaining behind at Rapulli. In the fort at Rapulli, in the room occupied by plaintiff, was deposited certain property, in silver, gold, jewels, ready money and other valuable articles belonging to herself, and also certain jewels the property of one Goverdhanaghiry Ramachendráyya, which were deposited for safe custody with plaintiff, the value of all the property being Rupees 12,000; the property was secured in locked boxes. In separate locked boxes were placed a few jewels, and the property belonging to 1st defendant who had brought them with him; all

(a) Present :—Holloway and Kindersley, J J.

1874. August 12. R. A. No. 50 of 1874.

these boxes were placed in the same room, viz, that occupied by plaintiff, and she locked and sealed the door of the room and took the key with her. During her absence at Rachur, on the night of the 21st January 1872, the 1st defendant had the door of the room, containing the aforesaid property, broken open, and dishonestly misappropriated the whole of the property therein contained; the 1st defendant further dishonestly misappropriated the brass utensils belonging to himself and plaintiff which were placed in another room, and which were not mixed up, the plaintiff's with the 1st defendant's. Plaintiff immediately took criminal proceedings before the Police and the Magistrate, but these authorities refused to take cognizance of the matter, being of opinion that it was entirely of a civil nature. The plaintiff, therefore, prays to recover the property, or its value, Rupees 9,985, being the balance after deducting the amount regarding which claim was abandoned.

The 1st defendant answered denying plaintiff's claim; he pleaded that the suit was barred by the Limitation Act, and that the plaint did not disclose any cause of action. He never, as alleged in the plaint, stole the property specified by plaintiff, and never caused it to be stolen; and he never misappropriated it, and never abetted any one else in so doing. The plaintiff, joining Goverdhanaghiry Ramachendrayya, her sister's son, misappropriated his property, and thereby caused much loss to him. In the schedule filed with the plaint, the items of property were not described by shape or weight so as to admit of identification, and the items are not properly valued.

The 2nd, 3rd, 4th, 7th and 8th defendants answered, traversing all the allegations in the plaint, and praying that the suit should be dismissed as against them with costs.

The 5th, 6th, and 9th defendants answered in person and were examined by the Court; they support the plaintiff, and allege that 1st defendant caused to be carried away the boxes containing property from the apartment of plaintiff.

1874. August 12. R. A. No. 50 of 1872.

On the 10th March 1874, the following issues, amongst others, were settled;

I. What is the cause of action in this suit?

Whether, as contended for the plaintiff, the mere wrongful act of the defendants is the cause of action, or whether, as contended for the defendants, no cause of action arises until possession of the property, alleged to have been dishonestly misappropriated, has been demanded and refused.

II. Whether the omissions in the plaint of a distinct allegation of demand by plaintiff, and refusal by defendants, of the property alleged to have been dishonestly misappropriated, can be supplied from the oral examination of the pleader for the plaintiff

III. Whether, if the 1st and 2nd issues be found for the defendants, this suit can be entertained.

IV. Whether if the 1st and 2nd issues be found for the plaintiff, this suit is barred under this Limitation Act.

The remaining four issues related to the property, its alleged removal, and the liability of the 2nd to 9th defendants.

On the 25th March 1874, the following judgment was delivered by Mr. W. Wilson, the Acting District Judge.

"These are issues of law, and amount, in brief, to whether the action is maintainable, and if maintainable, whether it is barred. It is contended for the defendants, relying on the provisions of Clause 48 of the schedule annexed to the Limitation Act IX of 1871, that the action cannot be maintained, because the plaint, while alleging that the property, sought to be recovered, had been dishonestly misappropriated by the defendants, contains no allegation that it had been demanded and refused, that the limitation for an action coming within the terms of Clause 48, runs from the time 'when the property is demanded and refused,' and that prior to that time there is no right to sue, because limitation runs from the time that the right to sue accrues: it is further argued for the defendants that should it be held that the cause of

action is the wrong itself, then the suit is barred, as the act of the defendants falls within Clause 26 of the schedule, which prescribes one year's limitation for the taking of moveable property, running from the time when the taking occurs. The plaintiff relies upon Clauses 34 and 40 and 118 of the schedule, by the first two of which two years limitation is provided, and by the last, six years; it is argued further, that even under Clause 84, on which the defendants rely, the suit is not barred as that gives a period of three years limitation. The plaintiff contends that the cause of action is the wrongful act of the defendants, and that with the cause of action, accrued the right to sue, without the necessity of demanding the restoration of the property; he argues, however, that the plaint sufficiently discloses the fact of demand and refusal; he contends that the criminal proceedings taken before the Magistrate amount to a demand; he alleges however, that demand was made in express terms after the occurrence of the wrong. He argues that the omission from the plaint of one express allegation of demand and refusal, is not, as argued for the defendants, fatal to the maintenance of the action, because the omission can, under the provisions of Section 139, Code of Civil Procedure, be supplied from his statements now, and the plaint amended. I am of opinion that none of the clauses of the schedule, quoted by either of the parties, is applicable to this case."

The learned Judge held that the case came within Clause 35, and that, under that clause " the period of limitation runs from the period when the property is demanded and refused. The period of limitation runs from the time when the right to sue accrues, because there can be no limitation till an action can be brought.

" The plaintiff argues that the right to sue accrues with the wrong, which is her cause of action. Generally speaking, it must be conceded that this is the case, but it is not so in every case; for instance ' in felonies, the remedy for the private injury by action at law is suspended until the sufferer fulfilled his duty to the public by prosecuting the offender for the public crime,' Stephens (a) Vol. III, 454.

(a) Stephen's Blackstone's Commentaries.

1874. August 12. R. A. No. 50. of 1874.

Again the law may impose a condition precedent to the right to sue. This is the case under Clause 35 of the schedule annexed to the Limitation Act IX of 1871. The right to sue under that, undoubtedly accrues 'when the property is demanded and refused.' 'Demand and refusal' is, therefore, a condition precedent to the right to sue. This plaint contains no allegation of demand and refusal; it is urged that the criminal proceedings taken by plaintiff before the Magistrate amount to a demand. They certainly do not; the demand must be addressed to, and the refusal made by, the person against whom the subsequent action is brought. The main and primary object of criminal proceedings is punishment, but they may be, and ordinarily are, taken without any demand addressed by the complainant to the defendant.

" It is argued for the plaintiff that the omission from the plaint of an express allegation of demand and refusal may be supplied under the provisions of Section 139 (*b*). That section gives the Court power to frame the issues on allegation of facts made by the parties at the first hearing, different from the allegations of facts contained in the written pleadings. But in this case there was no allegation of fact at all as regards demand and refusal, and the absence of the allegation is itself the ground of an issue as to whether the suit can be maintained. It is argued, for the plaintiff, that the fact of demand and refusal is a matter of evidence, and undoubtedly it would be, if the fact were alleged by the one party and denied by the other, but the question here is, whether, after objection taken by the defendants as to plaintiff's right to sue, the plaintiff is entitled to amend her plaint by supplying the omission on which the objection is found.

" The only provisions of the law relating to the amendment of plaints are contained in Sections 29 and 32 of C. C. P.

" The former provides for amendment when the plaint does not contain the particulars prescribed by Section 26, &c. In this case the plaint contains everything that Section 26 requires. Section 32 provides that the plaint may be amended " if upon the face of the plaint or after questioning the plaintiff, it appears to the Court that the subject matter

(*b*) Of Act VIII of 1859.

of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time. The section provides, therefore, for patent defects, but there is nothing of this nature on the face of this plaint: the defect is latent, discovered by the objection of the opposite party.

The plaintiff argued that under Section 32 the plaint might be amended at at any stage of the suit, because it provides that 'the Court may in any case allow the plaint to be amended.' This proviso is however only a counterpoise to the former part of the section which directs the rejection of a plaint which, on the face of it, discloses no cause of action, or is barred; besides the whole procedure as to amendment is prior to registry, and therefore lies only between the plaintiff and the Court. I am of opinion that no amendment can be made to the plaint, when the amendment proposed is the result of an objection made by the defendant, especially when that objection questions the very right to sue. The plaint cannot therefore be amended by inserting in it an express allegation of demand and refusal, with the date thereof. The right to sue does not accrue till the property has been demanded and refused; the action is therefore not maintainable. The suit is dismissed but without costs; but for the decision on the point of law, the plaint disclosed a good cause of action."

From this decision the plaintiff appealed on the following grounds:—

1. The Lower Court was in error in holding that an omission in the plaint to insert an express allegation of demand and refusal warrants the dismissal of the suit.

2. The criminal proceedings taken by the plaintiff before the suit was brought, and the 1st defendant's answer thereto, render a demand unnecessary.

3. The nature of the defence set up by the defendant herein obviates the necessity for a demand.

4. The institution of the suit is itself a demand.

5. Even if such an allegation is considered necessary, the plaintiff ought to have been permitted to amend the plaint when he applied for it.

1874. *August* 12. *R. A. No.* 50 *of* 1874.

Anandacharlu and *Kamasam* for the appellant, the plaintiff.

Bálágí Rau for the 1st, and *Karunakara Menon* for the 2nd to 4th, and 7th and 8th respondents, the defendants.

The Court delivered the following

JUDGMENT :—In this case the Judge has drawn from the innovation as to prescription running from demand the inference that no suit can be maintained until demand. This is not a permissible inference. The departure from legal principle based upon the notion almost entirely exploded that something more than the existence of a right is required to clothe it with an action, creates a discrepancy between the period at which a man *may* sue, and the period at which he *must* sue to avoid prescription. This, however, is an anomaly and must be limited to the special purpose for which it has been introduced. A debtor to whom money has not been lent for a fixed term is not *in morâ,* if he does not pay until demand. A creditor who sues before demand would justly be deprived of costs, and, if the suit was not resisted, perhaps properly be made to pay the defendant's. To say, however, that a right of demand is not clothed with an action because, in consequence of special provisions, the action will not be subject to destruction by prescription until something more happens, is to make this legal anomaly the means of creating a perfectly existent legal right uninvested with legal protection—a monster. If it were otherwise, we should not have approved of the dismissal of this suit on this technical ground when, on the answer coming in, it appeared that the whole matter was denied, and, moreover, the Statute of Limitations pleaded.

It is unnecessary, therefore, further to consider whether the present case is one of those in which this provision as to demands could have any application at all.

The decree must be reversed and the case remitted for decision. The costs of this appeal will be provided for in the final decree.

Appeal allowed.

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ABANDONMENT.

Plaintiff, a Mirasidar, purchased certain land in 1850 which he allowed to lie waste from 1853. In 1866, on the application of the 1st defendant, who was also a Mirasidar, to the 2nd defendant, the local Revenue Authority, the land was granted to 1st defendant, and made over to his possession. Plaintiff was admittedly in arrears of kist. In a suit by plaintiff to recover the land, it was contended that non-cultivation and non-payment of rent for a considerable time warranted the Revenue Authorities in entering upon and disposing of the land. *Held*, in special appeal, that plaintiff's tenancy could only be determined by his resignation or abandonment of his holding, or by the procedure laid down in Act II of 1864; that the letting land lie fallow does not necessarily lead to the inference of abandonment; and that, in the present case, plaintiff, not being found to have abandoned the land, had been ejected in a manner which the law does not recognize... 98

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By Innes, J.—Because it is not a document coming within Section 17 of Act XX of 1866. 1

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2.—In a suit for the recovery of immovable property sold under a registered deed of sale, 2nd, 3rd and 4th defendants pleaded a prior unregistered deed of sale to themselves. The suit was dismissed as the Lower Court held that certain admissions made by 1st defendant, in an enquiry held before the Registration Officer, were admissible in evidence to prove the sale to 3rd and 4th defendants.

Held, that the admissions made by 1st defendant were evidence against plaintiff, as made by one from whom plaintiff derived his title, but that the provisions of the Registration Act precluded any effect being given to the sale evidenced by such admissions; there being a writing, the sale could not be proved by mere oral evidence.

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Held, on appeal (by the majority of the Court) that no suit lay. The effect of Sections 52 to 55 is to make a decree under them of precisely the same validity as any other decree, to make it enforceable by the same process, but to render it impeachable on the special grounds referred to in Section 55.

Held, also, that the matters alleged were not such as, if proved, would have justified the setting aside of the decree. The special circumstances must be such as to show a vice in the mode in which the contract to submit to decree and the special registration were obtained, and an infirmity in the original obligation will not do 112

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4.—A special authority is required to empower a Mercantile Agent to draw and endorse Bills and Notes, but the authority may be implied from circumstances ... 369

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1.—Where the question was, whether there was the offer of one performance for another, and whether the continuous performance of the services on the one side was the presupposition of the continuous existence of the gift on the other, or whether there was a mere gift with a charge upon it, the primary intent being to give;—*Held*, that this was a question of construction, and that, in the present case, taking the agreement and counterpart together, there was clearly a covenant for the hereditary enjoyment of the land, to be exchanged for an hereditary performance of the services. 167

2.—Plaintiff is entitled to maintain a suit to set aside an agreement executed under threat of criminal prosecution for criminal trespass, for which charge there was no foundation 378

See WAIVER.

ALIENATION.

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ALIMONY.

See PLEADERS' FEES.

ALLEGATION.

See PLEADING.

APPEAL.

See ACQUITTAL.

AWARD,

ARBITRATION.

Where it is stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the Court to appoint an umpire, under Section 319 of Act VIII of 1859, is controlled and limited by that stipulation... 72

See ACT XX OF 1863.

ARCHAKAS.

See PAGODA.

ARREST.

A Mahommedan debtor was arrested within the original jurisdiction of the High Court on a Sunday. *Held*, that the provisions of the Lord's Day Act (XXIX Car. 2, C. 7) did not apply 285

ARTIFICIAL WATER-COURSE.

See EASEMENT.

ATTACHMENT.

See SALE UNDER DECREE.

AUTHORITY.

See AGENT.

AUTHORITY TO ADOPT.

See ADOPTION.

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AWARD.

Plaintiff sued for confirmation of an award delivered by arbitrators appointed by agreement of parties to decide upon his claim to a share of ancestral property. Defendant objected that the award was illegal, principally upon the ground that he had cancelled his submission some time before the award was passed. The District Judge ordered the award to be filed.

Held, that there was no appeal. 257

See ACT XX OF 1863.
ARBITRATION.

BILLS.

See AGENT.

BOARD OF REVENUE.

See PAGODA.

BOND.

See EVIDENCE.

BRAHMIN.

See ADOPTION.

CALINGULA.

See INJUNCTION.

CAUSE OF ACTION.

See JURISDICTION.
MISJOINDER.

CHAMPERTY.

See MAINTENANCE.

CHARITABLE TRUSTS.

See REGULATION VII OF 1817.

CHILDREN.

See MA'RUMAKATA'YAM.

COLLATERAL SECURITY.

See EVIDENCE.

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COMMITTEE.

See ACT XX OF 1863.
PAGODA.

CONCEALMENT.

See ACT XIV OF 1859.

CONDITIONAL SALE.

The plaintiff executed to the defendant a document in the following terms:—

"As I have conveyed to you as sale for Rs 6,000 the Papuchetti Seri adjoining the land of Kashah Jaggannanthapuram in the Zemindari of Madugula, they are given to you for absolute sale. In the event of my paying you the principal Rs. 6,000 within 6 months from this date, you must give back the said land Papuchetti Seri to me. In the event of our not being able to pay according to the said stipulation, you should hereditarily from son to grandson enjoy the produce of the said land, yourself paying to Government the assessment fixed on a subdivision, reckoning this sale money to be a pure sale."

Held, that this document was a sale with a condition for re-purchase. 6

See CONSTRUCTION.

CONNIVANCE.

See DIVORCE.

CONSENT.

See ADOPTION.

CONSIDERATION.

Defendants admitted the execution by them of the do-

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cument sued upon, and pleaded that it was given on consideration of the withdrawal of a Criminal Prosecution, or, if not, that there was no consideration at all; and that, at the time of its execution by them, there was no longer a dispute or question between them and plaintiff as to a partition of family property such dispute having been definitely settled by a Civil Suit in which defendants were successful.

Held, that such final judgment of a competent Court in a suit to which plaintiff was a party, had determined all the rights of the parties, and there was, therefore, no *res dubia* or *lis incerta* when the document was executed.

Held, that, on the facts of the case, the note was executed as a consideration for getting rid of criminal proceedings, and that such a consideration is not only null but vicious... 200

See CONTRACT.

CONSTRUCTION.

1.—The decisions of the late Sadr Court of Madras have carried the doctrine of relief after the time named in the conveyance so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule and have held the question one of construction, admitting however, for the purposes of the construction, other documents and oral evidence. ... 6

2.—Of the word "instrument" in Section 49 of the Registration Act, see Act XX of 1866, s. 49... 13

3.—Of the words "document necessary" in Section 9 of the Limitation Act 1859, see Act XIV of 1859, s. 9. 24

See ACT XIV OF 1859.
ACT XX OF 1866.
AGREEMENT.
CONDITIONAL SALE.

CONTRACT.

1.—1st defendant's father entered into possession of the property of *M.*, deceased, under *Illatom*, and afterwards, during the minority of his son (1st defendant), associated with himself the plaintiff, on promise of a share. In accordance with this agreement the plaintiff joined the 1st defendant's family, and continued for many years aiding in the management and improvement of the property, until, a short time before the present suit was brought, the 1st defendant turned the plaintiff out of doors and refused to give him the promised share.

Held, that there was a complete adoption and ratification of the father's contract by 1st defendant, and that he ought to be held to it 25

2.—The Zemindar of Marangapúri died leaving three childless widows, who assented to the recognition, by Government, of the late Zemindar's minor step-brother

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(defendant) as his successor. Two years after such recognition the widows executed a bond, according to which the plaintiff was to take proceedings to oust the minor, upon certain terms. Accordingly, in September 1868 he brought a Suit (No. 30 of 1868) against the Collector for the Zemindari, and, the minor attaining his majority in July 1869, he was made 2nd defendant in the suit. Five days before the hearing of the said suit, the senior widow sent for the defendant, who was persuaded by threats of ruin to sign a rázináma compromising the suit, and to give a note of hand for Rs. 62,000 to plaintiff's agents. A few days afterwards the plaintiff obtained, by similar threats, a bond for Rs. 67,000 in lieu of the note of hand for Rs. 62,000. The rázináma was, on presentation, rejected by the Court, which found that the bond, now sued upon, had been obtained under undue influence and by threats, and that the defendant had received no consideration for it.

Held, on appeal, that the contract was made with the woman; that there was a promise to pay this sum to the plaintiff whom she believed to be her creditor; that in pursuance of that arrangement the document was given. The cause of giving it was the compromise of the suit and that cause had wholly failed. It was a case, therefore, of suing for money which, if it had been paid, the defendant could have recovered (*ob causam datorum*) 85

CO-SHARER.

See SUCCESSION.

COVENANT.

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CRIMINAL APPEAL.

See ACQUITTAL.

CRIMINAL PROCEDURE CODE.

See ACT XXXV OF 1861.
ACT X OF 1872.
SECOND PUNISHMENT.

CRIMINAL PROSECUTION.

See AGREEMENT.

CULPABLE HOMICIDE.

Prisoner killed his mother by beating and kicking her. The Session Judge found that the death resulted from brutal beating and kicking, but acquitted of culpable homicide because the violence was not such as the prisoner must have known to be likely to cause death.

Held, that this was no ground for acquitting of culpable homicide not amounting to murder : the question for the Judge was whether the act was done with the intention

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of causing bodily injury which was likely to cause death 119

See CULPABLE NEGLIGENCE.

CULPABLE RASHNESS.

RASH ACT.

CULPABLE NEGLIGENCE.

"Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection." 120

CULPABLE RASHNESS.

"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (*luxuria*)" 119

CURRENCY NOTE.

A Rupees 50 Currency Note was stolen, and changed by the thief, at whose trial it was produced in evidence.

Held, that the Sessions Court was wrong in directing its delivery to the person from whom it was stolen, as the property in the note passed by mere delivery, and nothing short of fraud in taking an instrument payable to bearer will engraft an exception upon the rule 233

CUSTODY OF CHILDREN.

See MA'RUMAKATA'YA'M.

DAMAGES.

The suit was brought to cancel a Magistrate's order whereby 1st defendant was put in possession of the Choladi forest; to establish plaintiff's jenm right thereon; and to recover the same with Rupees 14,000, value of timber.

Held, that as to the value of the timber carried off, there was not that causal connection between its loss and a wrongful act of the defendant, which was needed to justify the award of Rupees 14,000 as damages. There was no evidence of the mode of the loss. The occasion for it was given by an order of a Magistrate, and the mere preferring of the complaint which gave birth to that order did not render the defendant responsible in the circumstances of the case... ... 235

DEBTOR.

See ARREST.

DECLARATORY SUIT.

1.—Where the object of the suit and the effect of the declaration would be to put the plaintiff in possession of that from which he had been ousted; *Held*, that it

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was not properly a suit for a declaration 267

2.—The plaintiff was the son of a mother of the deceased husband of the first defendant. The first defendant adopted a son 35 years after the death of her husband, in pursuance, as she alleged, of an authority to adopt given by her husband. The suit was brought by the plaintiff, to have the adoption declared invalid upon the ground that the adoption was made without the husband's authority. *Held*, a fit case for a declaratory decree... ... 351

See Ouster.

DECREE.

1.—A suit was compromised by a rázináma which required that a decree should be passed in conformity with its terms. The Munsif, instead of passing a regular decree, endorsed an informal order on the rázináma, and five years afterwards, upon an application for execution, made a formal decree and ordered its execution. The Civil Judge considered this procedure erroneous and ordered that the decree should not be acted on. *Held*, that it was competent to the Munsif to make a decree in pursuance of the rázináma, upon the application of the party interested, even after an interval of five years. And that, the decree having been properly made, the Judge had no authority to direct that it should not be acted on. 103

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2.—Where a decree has been adjusted between the parties by a contract binding upon them, a Court is not bound to issue process of execution upon the original decree, in violation of the terms of the contract, although the decree-holder refuses to certify the adjustment of the decree under Section 206 of Act VIII of 1859, especially where the Court executing the decree, is the Court to which the parties would go for the purpose of enforcing the contract... ... 387

See Mesne Profits.

DELAY.

See Divorce.

DEMAND.

See Limitation.

Dismissal of Suit.

DEPUTY MAGISTRATE.

See Jurisdiction.

DHARMAKARTA.

See Declaratory Suit,

Ouster.

Pagoda.

Reg. VII of 1817.

DISMISSAL OF SUIT.

A suit for property dishonestly misappropriated ought not to be dismissed on the technical ground that the plaint does not contain an allegation of demand and refusal, when the defendant, by his answer, traversed the whole of the allegations in the plaint, and

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pleaded the Statute of Limitations... ... 400

District Munsif.

See Jurisdiction.

Divorce.

Suit for a divorce on the ground of adultery. The marriage took place in 1860, the adultery commenced almost simultaneously with the marriage. The relief was sought in 1872. *Held* that, as until 1869 there were no means of obtaining relief, the question was whether the delay since that time had been sufficiently accounted for. Petitioner's excuse was that he believed that after seven years he could contract a second marriage. *Held*, also, that the delay ought not to be construed into an insensibility to the injury sustained, as the other circumstances of the case rebutted the existence of indifference approaching to connivance 284

See Pleaders' Fees.

Document.

See Evidence.

Earnings of Vakil.

See Self Acquisition.

Easement.

The plaintiffs sued for an injunction directing the defendants to close an irrigation channel which was opened in 1869, and to remove the sluice, on the ground that the supply by the channel which for many years had supplied water to the plaintiffs' village, had never been sufficient for the wants of the village, and that the new channel must necessarily cause a still further deficiency. The Civil Judge found that the plaintiffs had sustained no loss by the opening of the new channel, and dismissed the suit. On appeal it was contended; 1st. That plaintiffs had an absolute right to the uninterrupted flow of all the water in the Kuduvai channel without subtraction or diminution by the defendants or by the Government, represented by the 2nd defendant, and that any diminution, though not causing loss, was an invasion of their right. 2nd, that if they had not such absolute right, they had a right to a supply of water for the necessary purposes of irrigation and otherwise for their village, and that the possibility of loss at some future time, arising from possible wrongful diminution of the water to their detriment through the new sluice and channel, entitled them to the relief claimed.

Held on the 1st point.—That the plaintiffs' right was limited to the beneficial enjoyment of the water as heretofore enjoyed. That Government, as proprietor of the channel and the water in it, had, subject to

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such, and similar limited use, a right to distribute the water for the benefit of the public.

Held upon the 2nd point.—That no ground existed for granting an injunction, as no right of the plaintiffs had been invaded, no damage had accrued, and no case of prospective damage had been made out ... 60

See INJUNCTION.

EJECTMENT.

See ABANDONMENT.

ELECTION.

See LIMITATION.

ENDORSEMENT.

See ACKNOWLEDGMENT IN WRITING. ACT XX OF 1866.

EVIDENCE.

1.—In a suit to recover an overpayment of a mortgage claim, an unsigned and unregistered endorsement of such payment made by the mortgagee (defendant) on the registered mortgage bond was tendered as evidence of such payment:—

Held, that the endorsement was admissible as confirmatory evidence of the sum received by the defendant notwithstanding the want of signature.

Held, that as mere confirmatory proof of a fact provable by oral evidence although stated in writing, the endorsement was admissible, although not registered 1

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2.—Where there is a deed of sale which is inadmissible in evidence because unregistered, the sale recited in such deed cannot be proved by mere oral evidence... 13

3.—Suit for balance of principal due for money lent with interest thereon at 5 per cent. per mensem. Plaintiff declined to lend on the terms of a joint interest in a venture proposed by the defendant, and the latter refused to pay the rate of interest demanded by the plaintiff. Before any final agreement, and while the transaction was still incomplete, a promissory note was given by defendant to plaintiff for Rs. 2,000, payable on demand, with interest at 12 per cent. per annum. Plaintiff alleged, and defendant denied, that it was agreed that this note should be cancelled on receipt of a letter from the defendant, fixing the rate of interest. Defendant subsequently wrote two letters to plaintiff, agreeing to pay interest at 5 per cent. per mensem, and plaintiff endorsed the said note as cancelled, plaintiff further alleged, and defendant denied, that he (plaintiff) received interest at 5 per cent. per mensem for two months, and called a witness who deposed to that effect.

Held, on appeal, that such oral evidence was admissible. 189

4.—Under the provisions of

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Section 49 of Act VIII of 1871 an unregistered bond, though immovable property be made by the terms of it collateral security, is admissible in evidence in a suit to enforce the personal liability of the person executing the bond. It is only excluded where it is offered as evidence of a transaction affecting immovable property ... 296

5.—The judgment in a suit in which the cousin of a former manager sued him for a partition of certain villages, some of which were included in the present suit and in which it was decided that the manager was manager and not owner, was *Held*, by INNES, J. (KINDERSLEY, J. dubitante,) to be a decision upon a question of public right ... 307

See ACT XX OF 1866.
PROMISSORY NOTE.
REGISTRATION.

EXTORTION.

See JURISDICTION.

FAMILY AGREEMENT.

See WAIVER.

FORMER JUDGMENT.

See EVIDENCE.

FRAUDULENT CONCEALMENT.

See ACT XIV OF 1859.

GAINS OF SCIENCE.

See SELF ACQUISITION.

GUARDIAN.

See MA'RUMAKATA'YAM.

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HEAD ASSISTANT MAGISTRATE.

See JURISDICTION.

HIDDEN TREASURE.

Certain property was found in an underground masonry building in the bed of a tank belonging to the Zemindári of Shivagunga. It was sent by the Magistracy to the Court of the Principal Sadr Amin of Madura to be dealt with under Regulation XI of 1832. Claims were made by the Ráni of Shivagunga, and by the finder. The Principal Sadr Amin directed delivery to the Ráni. On appeal, the Civil Court directed delivery to the finder. *Held*, on special appeal, that the Ráni had no title to what had been hidden in former times in the soil now belonging to her; that as she had no title, the right to the property lay between the finder and the State, which had made no claim. ... 150

See REGULATION XI OF 1832.

HINDU.

See NATIVE CHRISTIAN.

HINDU LAW.

See ADOPTION.
ILLATOM.
SELF-ACQUISITION.
SUCCESSION.

ILLATOM.

A special custom which entitles a man to select a son-in-law who should take his property as if a son. The person so selected is, what

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is called in English law, a purchaser, and has all the powers of disposition existent over self-acquired property. 30

By INNES, J. The right of such person to dispose of property self-acquired might depend upon whether his son was or was not in being at the date of the acquisition... 31

See CONTRACT.

INDIAN SUCCESSION ACT.

See NATIVE CHRISTIAN.

INFORMAL ORDER.

See DECREE.

INJUNCTION.

1.—A permanent injunction is only granted;—1st. When some established right has been invaded—and 2nd, when damage has accrued or must necessarily accrue from the act or omission complained of 71

2.—Plaintiffs, who were ryots under Government, sued to restrain defendants from so altering a calingula as to diminish the quantity of water which the plaintiffs had received for a long time.

Held by HOLLOWAY, J. That no legal right was shown by plaintiffs, and that if such right were established there was nothing to show that a decree for damages would not have been the proper remedy. *Per* INNES, J., that the evidence did not show any diminution of the supply of the water below the quantity to which the plaintiffs were entitled ... 342

See EASEMENT.

INSTALMENTS.

See LIMITATION.

INSTRUMENT.

See ACT XX OF 1860.

INTEREST.

See EVIDENCE.

IRRIGATION.

See EASEMENT.

JUDGMENT.

See EVIDENCE.

JUDICIAL SEPARATION.

See PLEADERS' FEES.

JURISDICTION.

1.—Where a mortgage was executed in one Zillah, and the lands mortgaged were situated in another Zillah, *Held* that the Registration Act (XVI of 1864) which governed the case, compelled registration in the district in which the lands are situated; that the defendant was under an obligation to plaintiff to get the document registered at that place; that the breach of this obligation was the cause of action; and that, consequently, the Court at the place of the fulfilment of the obligation had jurisdiction. 176

2.—The Courts of the Head Assistant Magistrate and of the Deputy Magistrate have jurisdiction to try a District Munsif on charges of extor-

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tion in the course of the exercise of his judicial functions. The Sessions Judge is the proper person to sanction such prosecution. 182

3.—*By* INNES, J.—The rule (laid down in Section 8, Reg. VI of 1816) requiring the committal of such cases to the Court of Session, has been impliedly, though not expressly, repealed ... 182

4.—According to Section 13 of Act III of 1873, it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages 356

5.—A District Munsif has no jurisdiction to try a suit brought to cancel a document creating a charge of Rs. 4,500 upon immovable property, upon the ground of fraud 372

See REG. VII OF 1817.

KARNAVAN.

See MA'RUMAKATA'YAM.

LAND. SUIT FOR

The plaintiff purchased certain property from the 1st and 2nd defendants. The property was subsequently put up for sale by order of the Civil Court in execution of a decree against the 1st and 2nd defendants, and was purchased by the 3rd defendant. When the proproperty was about to be sold under the decree, the plaintiff presented to the Court a petition objecting to the sale, but his Vakil withdrew the petition, with his consent, before the sale. In a suit by the plaintiff for the recovery of the land;

Held, that he was not precluded from recovering the land by reason of his having withdrawn the petition ... 359

LICENSE TAX.

See TAX.

LIMITATION.

1.—Plaintiff sued for cancellation of the sale of certain lands, made to defendants in 1841. In 1843 defendants executed an agreement to plaintiff, giving her a right to repurchase—"If you and your posterity pay in a lump sum the 175 Rupees, we will hand over the lands to you."

Held, that the plaintiff's claim was barred, more than 12 years from the date of the cause of action (1843 at the latest) having elapsed before suit. ... 219

2.—In a suit by the widow of one undivided brother against the survivor, for maintenance;

Held, that the husband's estate in the hands of the survivor was that to which the charge attached, and that the husband's death was the period from which the Limitation Act began to run against the claim for past maintenance 226

3.—Plaintiff's claim—to be entitled to the advantage of Section 14 of the Limitation Act, because he was

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for a time prosecuting suits against defendants separately for the arrears of rents alleged to be barred, all which suits were dismissed on the ground that plaintiff could not sue the defendants separately as they had executed the muchilka jointly—failed at every turn. The cause of action was not the same, for there the obligation sued upon was several, here it is joint. The Court which decided the former suits not only did not fail to decide them but did decide them 242

4.—The period of limitation applicable to a suit for rent was 3 years under Act XIV of 1859 242

5.—The Limitation Act (IX of 1871) does not give a new period of limitation to a suit on a bond which was barred by the old Limitation Act (XIV of 1859) before the new Limitation Act came into force ... 283

6.—Where, by the law in operation at the date of the execution of a bond payable on demand, payment could not be enforced by suit after three years from that time, the new law conferred no right of suit founded upon a demand subsequently made. The repeal of the former Act could not affect the legal bar which had previously arisen ... 288

7.—Suit brought in 1873 for principal and interest due on a bond dated 1850, whereby the debt was payable by annual instalments on failure of any of which the whole amount was to be payable on demand. No instalment was paid. *Held*, that the usual clause, that on failure to pay one instalment the whole amount shall be payable on demand, gave a mere election to plaintiff of converting the obligation into a different one, that that election was never exercised, and that the document continued one securing the payment of a debt by instalments as to all of which the action had long been barred. ... 293

8.—The rule of the old, as of the new law of limitation, is, that the time having once begun to run, cannot be stopped 298

9.—In a suit brought after the 1st April 1873 on a promissory note for a sum payable on demand, executed while the old Limitation Act (XIV of 1859) was in force, but not barred under that Act at the time the new Limitation Act (IX of 1871) came into force, the period of limitation ought to be computed from the date of the note 392

LIS PENDENS.

1.—The doctrine of "lis pendens" applies to this country 104

2.—Plaintiff in Suit No. 16 of 1867 claimed to have a mortgage on one-third share of a cotton-screw,

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and prayed for payment of the amount out of that property, and, pending the decision, the plaintiff in O. S. 1 of 1871, purchased under a decree by the Munsif against the defendant in Suit No. 16 of 1867. *Held*, that he took only what the defendant could give and subject to any decree to be made in No. 16 of 1867. The fact, if it was so, that the plaintiff had no notice of the suit, is not material in this country, as there is not as yet any registration here of "lis pendens" and the law, as it stood in England before 2 and 3 Vict. c. 11, applies. 104

See CONSIDERATION.

LORD'S DAY ACT.

See ARREST.

MADRAS ACT VIII OF 1865.

(*Rent Recovery.*)

[S. 7.]

1.—The pendency of a suit brought for the determination of the proper rate of rent, does not render the tender of puttahs unnecessary. 51

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2.—A suit to be reinstated in the possession of a Zemindar's "pannai" lands is maintainable before the Revenue Authorities ... 53

See "PANNAI" LANDS.

PUTTAHS.

MADRAS ACT III OF 1871.

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MADRAS CIVIL COURTS ACT.

See JURISDICTION.

MAINTENANCE.

Plaintiff consented to advance money for the purposes of a suit to be filed by defendants. By a so-called mortgage bond, defendants mortgaged every thing to which they might be entitled or recover by suit, the mortgage to be defeasible on payment of a certain per-centage on what might be recovered. Defendants also covenanted to repay the money lent with interest. The defendants succeeded in their suit, and plaintiff sued to obtain a commission of 50 per cent., on the sums recovered by them, and the sums advanced by plaintiff, with interest. Defendants pleaded that plaintiff had not fulfilled his part of the agreement, and that the agreement was void for champerty and maintenance.

Held, that by the Law of England, which prevailed in the present suit, this contract was clearly void, being contrary to the plain provisions of the Common and Statute Law against maintenance, and that it was void as being contrary to public policy. The Court further *held*, that the plaintiff had failed to fulfil his part of the contract, but allowed him to recover the sum really advanced by him, with interest. ... 128

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MALVERSATION.

See ACT XX OF 1863.
REG. VII OF 1817.

MANAGEMENT.

See REG. VII OF 1817.

MANAGER.

See ACT XX OF 1863.
EVIDENCE.
PAGODA.

MARK.

See ACKNOWLEDGMENT IN WRITING.
BOND.

MA'RUMAKATA'YAM.

The Civil Judge removed two children, governed by the rule of Márumakatáyam, from the custody of their Karnavan, and placed them under the guardianship of their father. *Held*, that the order should be reversed on the grounds that no case had arisen for the exercise of the Civil Judge's power, and that the order was wholly opposed to the very principle upon which the Márumakatáyam depends... 179

MERCANTILE AGENT.

See AGENT.

MESNE PROFITS.

Plaintiff brought a suit, (O. S. No. 1 of 1858), claiming certain lands and mesne profits for 1 year, (1858) and obtained a decree as sued for. He subsequently applied for execution, claiming mesne profits up to 1864, which the Civil Court awarded. *Held*, on appeal, that as the mesne profits, in regard to which the appeal was made, were not made payable by the decree, they could not be awarded in execution... 97

See DECREE.

MISJOINDER.

Plaintiff sued all the alienees to recover his father's estate as a whole, the different alienations having been made during his minority by his father's widows at different times. *Held*, that plaintiff's cause of action,—the right—was his relation to the family to which the property belonged, and, on this right, if established, and if he was not otherwise barred, he would be entitled to recover ... 260

See MULTIFARIOUSNESS.

MORTGAGE.

1.—A prior mortgagee, having purchased, may still use his mortgage as a shield against the claims of subsequent mortgagees... 229

2.—Where a document is, on its face, a mortgage, the right to redeem is so much an essential as not to be variable by agreement ... 395

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JURISDICTION.
REGISTRATION.

MUDDATA KRIYAM.

Land mortgaged with option to the lender to consider it as his property if the

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mortgage is not redeemed within a stipulated period. 9

MUNICIPAL TAX.

See TAX.

MULTIFARIOUSNESS.

1.—Under the terms of an agreement between 1st and 2nd defendants, and plaintiffs, as members of a Pagoda Committee, a sum of Rupees 6,500 was due, of which only Rs. 2,019-14-0 were credited in the accounts of the Pagoda. When required to account for the balance, the 1st and 2nd defendants informed the plaintiffs that they had paid to the 3rd defendant, the then Manager of the temple, Rs. 5,330 and that only Rs. 1,170 were due by them. Present suit was against all three defendants for the balance Rs. 4,480-2-0. The Court of first instance decreed against 3rd defendant alone; on appeal, the Civil Judge dismissed the suit as multifarious against the 3d defendant, he having been sued on the ground of mis-appropriation, while the cause of action against the 1st defendant was breach of contract. *Held,* on special appeal, that the suit was not multifarious; that the 3rd defendant was properly included in the suit as a defendant; and did not appear to have been prejudiced in his defence by the course of the proceedings 123

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2.—A suit brought against a number of alienees of a deceased member of an undivided family, for the recovery of family property illegally alienated by him, is not such a suit as ought to be dismissed on the ground of multifariousness. 290

See MISJOINDER.

NATIVE CHRISTIAN.

Petitioner, a Native Christian, applied, under Act XXVII of 1860, for a certificate of heirship to his deceased grandfather.

Held, that Native Christians are not "Hindus" within the meaning of the term as used in Section 331 of the Indian Succession Act X of 1865, and, therefore, that they are affected by the provisions of that Act, and cannot proceed under Act XXVII of 1860. 121

NOTICE.

See PROMISSORY NOTE.

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"ON DEMAND."

See LIMITATION.

OUSTER.

When a plaintiff is ousted from a possession which he held upon a good title by those who show none, he has a right to the restoration of that possession ... 267

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OVER-DUE NOTE.

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PAGODA.

1.—It is not competent to the Archakas of a Pagoda of their own authority to make an alienation for the purpose of altering the form of worship in the Pagoda, or in contemplation of such alteration. Any assignment of the office must carry with it the duty of continuing the form of worship hitherto observed... 32

2.—Assuming that the Board of Revenue had a right to interfere with the appointment of Dharmakarta; *Held*, that there was nothing in Regulation VII of 1817 to prevent them renouncing that right if they chose... ... 77

3.—Plaintiff sued to establish his right to the custody, management, and appropriation for the purpose of a Pagoda, of certain jewels, &c., used in the religious ceremonies performed in the Pagoda, which jewels he alleged had been assigned to him by the Urallers of the Pagoda.

Held, that a religious office cannot be made the object of a sale, and that materials used in religious worship are absolutely *extra commercium* 210

4.—The District Judge found that the title to the villages sued for was in the temples, of which the plaintiffs were the trustees, but that as defendant had been lawfully placed in management by the Board of Revenue in 1858, he was entitled to hold the villages for life. *Held*, on appeal, that the title to manage must reside in the Pagoda if it did not reside in the defendant, and that plaintiff was entitled to possess and manage the property as trustee of the temples. *Held*, that the Government could not create a valid title to more than they themselves possessed; that they had simply taken over possession and management of the endowment, and had afterwards given it over to defendant; that by so doing they did not appoint a manager under Reg. VII of 1817. 306

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DECLARATORY SUIT.

OUSTER.

REG. VII OF 1817.

"PANNAI" LANDS.

1.—Such lands are those to which the proprietor has an exclusive right, a right to the Kudivaram and to the Melvaram. 53

2.—As a Zemindar does not lose his character of Zemindar when he deals with his pannai land, a suit brought to be reinstated in the possession of such lands from which the plaintiffs have been wrongfully ejected by the Zemindar, is maintainable before the Revenue authorities 53

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See ACKNOWLEDGMENT IN WRITING.
ACT XX OF 1866.

PENALTY.

See PROMISSORY NOTE.

PERSONAL LIABILITY.

See EVIDENCE.

PLAINT.

See PLEADING.

PLEADERS' FEES.

In a suit for a judicial separation and alimony, decided under the Indian Divorce Act (IV of 1869), the only basis for the estimation of pleaders' fees is ten times the amount of alimony for one year ... 394

PLEADING.

In a suit by the plaintiffs to recover damages from the defendant, a surety, upon a contract to deliver coffee to the plaintiff, the plaint did not allege the willingness of the plaintiff to pay on delivery.

Held, that such allegation was not necessary, its absence not having prejudiced the defendant 364

See MULTIFAIROUSNESS.
VARIANCE.

POOJA STANIKER.

See DECLARATORY SUIT.
OUSTER.

POSSESSION.

See AGENT.
OUSTER.

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PRESCRIPTION.

The tank used for the irrigation of the plaintiff's village was supplied, in part, by rain water falling on the lands of the village occupied by defendants 9 to 17, and the bund of the tank used formerly to throw back the waters so flowing into the tank on to the lands of defendants, where it remained till gradually drawn off into the area of the tank. Defendants 9 to 17, through the agency of Government, relieved themselves of this inconvenience by making a work for draining off the water so periodically thrown back upon their land. A channel was also constructed for conducting a supply of water to the plaintiff's tank. Plaintiffs, however, claimed to have the former state of things restored, on the ground that they had a prescriptive right to throw back the water on to defendants' lands, and to keep it there till required for use.

Held, that there was here no object over which a right could be acquired. ... 37

PRINCIPAL.

See AGENT.
SURETY.

PRIOR MORTGAGE.

See MORTGAGE.

PROFESSIONAL EARNINGS.

See SELF-ACQUISITION.

PROFESSION TAX.

See TAX.

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PROMISSORY NOTE.

1.—In a suit by indorsee against the maker of a Promissory Note payable on demand, the defence was that the note was given as an acknowledgment of the receipt of money, and as a security for what should be due to the maker in respect of certain dealings between the maker and defendant. The accounts showed a balance in favour of defendant. Notice of these facts was alleged to have been given to plaintiff to whom the note was endorsed two years and eleven months after date. *Held*, that although the evidence failed to make out notice to the plaintiff, the note, when endorsed, was an overdue note, and that the plaintiff took it subject to the then state of the accounts between the payee and the defendant. ... 271

2.—A Promissory Note upon a one anna stamp, dated in August 1870 provided for the repayment of the amount mentioned in it on or before the 12th July 1871. *Held*, that the note was not receivable in evidence upon payment of a penalty 361

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EVIDENCE.

PUBLIC POLICY.

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PUBLIC RIGHT.

See EVIDENCE.

PUTTAHS.

1.—The pendency of a suit brought for determination of the proper rate of rent, does not render the tender of puttahs unnecessary. 51

2.—Plaintiff sued for certain arrears of rent. The suit was dismissed as to Faslies 1271, 1272, and 1275 on the ground that no puttahs had been tendered for those Faslies. On special appeal it was contended that no tender was necessary, because a suit, which had been brought before Fasli 1271 for the determination of the proper rate of rent, was pending during those Faslies. *Held*, that the pendency of that suit did not render the tender of puttahs unnecessary, and that the present suit was rightly dismissed. 51

3.—An agreement between a landlord and tenant, in the Presidency of Madras, for more than one year is a puttah within the meaning of Act VIII of 1865. ... 234

4.—Suits for the recovery of rent cannot be maintained in the Civil Courts by the landholders described in Section 3 of Madras Act VIII of 1865 unless puttahs and muchilkas have been exchanged between the landholder and the tenant as required by Section 7 of the Act, or some one of the other conditions of the Section has been complied with. 312

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5.—Suits for rent may be maintained by the landholders described in Section 13 of Madras Act VIII of 1865, without complying with the requirements contained in Section 7. ... 313

6.—Where puttahs must be tendered, tender must be made before the expiration of the Fasli for which rent is sought to be recovered ... 313

7.—In order to enable a landholder to maintain a suit in the Civil Courts for rent, where Madras Act VIII of 1865 requires that puttahs should be tendered, such tender must be made within the Fasli for which rent is sought to be recovered ... 359

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RATIFICATION.

Where the act of the agent has been communicated to, and has been ratified by, the principal, it becomes the act of the principal in point of law... 369

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1.—An agreement between a landlord and tenant, in the Presidency of Madras, for more than one year is a puttah within the meaning of Act VIII of 1865, and consequently exempted from registration under Act XX of 1866 234

2.—A suit was brought to recover money secured by a mortgage made in 1870, whilst the Registration Act XX of 1866 was in force. By Act XX of 1866, the document was not admissible in evidence even to enforce the demand for money, as it was not registered. By Act VIII of 1871, the document was rendered admissible when the suit was brought. *Held*, that the document was admissible in evidence ... 348

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2.—*Held*, that Regulation VII of 1817 is clearly intended

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to be supplementary of existing remedies, and the Courts had, unquestionably, jurisdiction in such cases prior to its enactment. The expression in Section 14 of the Regulation is not intended to limit the jurisdiction of the Courts to the cases contemplated in it, but rather to provide against the finality of erroneous orders that may be passed by the Board of Revenue under the Regulation 117

See PAGODA.

REGULATION XI OF 1832.

The finders of hidden treasure gave no notice of their discovery to any public authority, the Sub-Magistrate recovered the property 3 or 4 days after it was found, and sent it to the Court of the Principal Sadr Amin who disposed of it under Regulation XI of 1832. On the objection that the formalities prescribed by the Regulation had not been complied with; *Held*, that though immediate notice had not been given by the finder, the property was, within 3 or 4 days of its discovery, in the hands of the authorities, who might be said, therefore, to have supplied the necessary notice. ... 150

See HIDDEN TREASURE.

REMOVAL OF CHILDREN.

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RE-PURCHASE.

See CONSTRUCTION.
MORTGAGE.

RES DUBIA.

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RES JUDICATA.

By a decree in *Suit No.* 2 *of* 1857, confirmed by the Sadr Court in *Appeal Suit No.* 234 *of* 1859, plaintiff (who was plaintiff also in that suit) sued for a declaration of his status as the son of his father's Pattába Strí, or royal wife. Plaintiff's father was 1st defendant, and present defendant's mother was 2nd defendant, and both denied that plaintiff was son of the Pattába Strí. This point formed one of the issues in the case, and was found against plaintiff. On appeal the judgment of the Lower Court was confirmed, and the appellant's (plaintiff's) attempt to maintain his right to succeed as being the eldest son was held to be inadmissible, as that was not the position taken in the Court below. In the present suit plaintiff sued to recover the Zemindary setting up that he was the son of the 1st wife of the deceased Zemindar (the 1st defendant in *Suit No.* 2 *of* 1857), and that as the eldest son, he had a legal claim thereto.

Held, on appeal, that the present suit was barred by res judicata, a different " caus-

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sa" to the former not having been adduced. ...160

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1.—The sanction of the Governor in Council under Section 38 of Madras Act III of 1871, was obtained on the 4th July 1871, with authority to levy the tax from the 1st May 1871.

Held, that the Act had no retrospective effect, and that a levy of tax from the commencement of the year was illegal... 249

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VARIANCE.

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WAIVER.

The plaintiff in the present suit insisted upon a valid family compact varying the ordinary rules of inheritance, having, however, previously appealed to that general rule, and designedly kept back the compact upon which she now sought to insist. *Held*, that there could be no stronger case of an absolute waiver of that contract, and of conduct rendering it wholly inequitable to permit her now to insist upon it 263

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ZEMINDAR'S "PANNAI" LANDS.

See "PANNAI" LANDS.

MADRAS HIGH COURT RULINGS.

Appellate Side.

Proceedings, 5th January 1872.

UPON reading a letter from the Magistrate of Salem, requesting instructions regarding the proper procedure to be followed in cases falling under Act XIII of 1859, 1872. *January 5.*

The High Court made the following

RULING :—The question referred is,

In cases falling under Act XIII of 1859 the Calendar should be submitted to the Appellate authority immediately that an order under the first part of Section 2 is passed. When further proceedings under the latter part of Section 2 are taken, a simple copy of the order, containing a reference to the Calendar, should be sent.

"At what stage should the Calendar be submitted to the "Appellate authority—on the passing "of the order for the performance of "the contract, or the re-payment of "the advance—or on imprisonment "being awarded in default of compli- "ance with the order?"

The High Court are of opinion that a Calendar should be sent immediately that an order under the first part of Section 2 is passed. The trial is then completed, as before passing an order the Magistrate must have found the facts necessary to constitute the offence of fraudulent breach of contract. When further proceedings under the latter part of Section 2 are taken, it will suffice to send a simple copy of the order containing a reference to the Calendar.

Appellate Side.

Proceedings, 16th January 1872.

UPON reading a letter from the Civil Judge of Tanjore, requesting an authoritative construction of the provisions of Articles 4 and 5 of Schedule I of Act VII of 1870, 1872. *January 16.*

The High Court made the following

The stamp fee on an application for review of judgment must be calculated on the amount which would be obtained if the review were granted, and not necessarily on the whole value of the suit.

RULING :—The question referred is whether the stamp fee on an application for review of judgment is to be calculated upon the amount originally at issue in the plaint or appeal memorandum, or upon the amount at issue in the application for review of judgment. To take an

1872. January 16. example :—The object-matter of an appeal is valued at 1,500 Rupees, and a stamp fee of 100 Rupees is levied. The appellant partly succeeds in his appeal, and the value of the object-matter is thus reduced to 1,000 Rupees. In an application by the appellant for review of judgment is the stamp fee to be calculated upon 1,500 Rupees or upon 1,000 Rupees?

A majority of the Court are of opinion that although the words of the Schedule may seem in some measure to favor an opposite construction, the stamp fee must be calculated on the amount which would be obtained if the review were granted, and not necessarily on the whole value of the suit. The leading principle of the Act is that the amount of the stamp fee is to be calculated on the relief sought, and when a man seeks to obtain by a review more than the Court has already given him, the excess is the relief which he seeks by his petition. The words in Articles 4 and 5 of Schedule I are *the fee leviable on the plaint or memorandum of appeal*, and they must be taken to mean the fee which would be leviable on the plaint or memorandum of appeal which would be requisite if there were a fresh plaint or memorandum of appeal seeking the additional relief which the petitions of review seeks.

Appellate Side.

Proceedings, 17th *January* 1872.

1872. January 17. UPON reading a letter from the Magistrate of South Arcot, forwarding copies of certain Proceedings of the Session Court of Cuddalore for the opinion and orders of the High Court,

The High Court passed the following

RULING :—The facts which gave rise to this correspondence were as follows :—

Section 273 of the Criminal Procedure Code applies only to Criminal cases brought before the Magistrate of the District, &c., either on complaint preferred direct to such Magistrate or on the report of a Police Officer. There is no provision of the Code which authorizes a Magistrate acting under Section 68 of the Code to refer the case for enquiry or trial to another Magistrate. Section 68 merely authorizes him to take cognizance of offences without complaint and to issue summons or warrant.

On receipt of a report from the Deputy Magistrate Stree Baliah, who was temporarily in charge of Cuddalore Taluq, concerning the conduct of a Revenue Inspector in that taluq, the District Magistrate determined to institute a prosecution against the Revenue Inspector, and deputed the Deputy Magistrate to hold the enquiry. The Revenue Inspector was accordingly tried and convicted by

the Deputy Magistrate under Section 409 of the Penal Code, but on appeal that conviction was reversed by the Session Court, on the ground that the Deputy Magistrate had no jurisdiction, and that the District Magistrate had no authority to confer jurisdiction, under Section 273 of the Criminal Procedure Code, until the case was judicially before him. To this the District Magistrate demurs and submits the papers for the opinion of the High Court.

1872. *January* 17.

The High Court have only to observe that Section 273 applies only to Criminal cases brought before the Magistrate of the District, &c., either on complaint preferred direct to such Magistrate, or on the report of a Police Officer. It could not, therefore, apply in the present case. There does not appear to be any provision of the Code which authorizes a Magistrate, acting under Section 68 of the Code, to refer the case for enquiry or trial to another Magistrate. Section 68 merely authorizes him to take cognizance of offences without complaint and to issue summons or warrant.

Appellate Side.

Proceedings, 20th February 1872.

1872. *February* 20.

UPON a reference by the Session Judge of Salem of the Proceedings of the Joint Magistrate of Salem, in Criminal Appeal No. 19 of 1871, as contrary to law,

The High Court made the following

A conviction under Section 174 of the Penal Code for disobeying a verbal order of a village Magistrate is good.

RULING:—In this case the Sub-Magistrate convicted the accused, under Section 174 of the Penal Code, for disobeying a verbal order of a Village Magistrate directing his attendance. On appeal the Joint Magistrate reversed the sentence, on the grounds that Village Magistrates, being Magistrates within the meaning of Section 15 of the Code of Criminal Procedure, are bound to issue written summonses in the mode prescribed by Section 69, and that there is no legal obligation to obey a verbal order.

The Session Judge, dissenting from this view, refers the question for the consideration of the High Court.

The High Court are of opinion that the verbal order of the Village Magistrate was a legal order, and that disobedience to it was an offence. Section 442 of the Code preserves not only the

1872. *February* 20.

powers but the procedure of Village Magistrates, and declares that neither shall be affected by the Code. The grounds of the Joint Magistrate's decision are, therefore, erroneous, and this should be notified to him.

The ground of reversal of the decision of the Sub-Magistrate being bad in law, and going solely upon that ground, the decision of the Joint Magistrate must be reversed and that of the Sub-Magistrate restored.

Appellate Side.

Proceedings, 11*th March* 1872.

1872. *March* 11.

UPON a reference by the Acting Session Judge of Tinnevelly of certain Proceedings of the Acting Head Assistant Magistrate of Tinnevelly as contrary to law,

The High Court made the following

Section 44 of Act XXIV of 1859 applies only to Police Officers enrolled and appointed in the manner prescribed in Sections 8, 10 and 11 of the Act. Village Káválgárs not being so appointed are not punishable under Section 44.

RULING :—In this case certain village watchmen termed Kávâlgárs were convicted by the Head Assistant Magistrate of ceasing to perform the duties of their office without leave, an offence punishable under Section 44 of Act XXIV of 1859 (Police Act), and sentenced each to one month's rigorous imprisonment.

The question referred is whether the Kávâlgárs are Police Officers within the meaning of Act XXIV of 1859.

Section 1 enacts that the word " Police" shall include General and Village Police, Kattubadies, Kávâlgárs and all other persons by whatever name known who exercise any Police functions throughout the Madras Presidency.

On the ground that Section 44 of Act XXIV of 1859 applies only to Police Officers enrolled and appointed in the manner prescribed in Sections 8, 10 and 11 of the Act, and that the Kávâlgárs have not been thus enrolled and appointed, the convictions must be quashed. The terms of imprisonment have already expired.

Appellate Side.

Proceedings, 23rd April 1872.

1872. *April 23.*

UPON the question by the Magistrate of South Arcot whether the Magistrate of the District is competent to refer cases, under Section 273 of the Code of Criminal Procedure, to a Divisional Magistrate exercising full powers,

The High Court made the following

Section 23 G of the Code of Criminal Procedure makes the Magistrate of a District competent to refer cases under Sec. 273 of the Code to a Divisional Magistrate exercising full powers.

RULING :—The question is whether Section 273 is affected by Section 23G of the Code, which was enacted by Act VIII of 1869. Section 23G declares the subordination of Divisional Magistrates to the Magistrate of the District, and when this Section became law, Section 273 at once gave the power of reference to a Magistrate of a Division, who, in regard to the Magistrate of the District, became a Subordinate Magistrate. That Chapter XVI of the Code did not originally apply to any but those who were technically called Subordinate Magistrates can itself make no difference. The construction put by the District Magistrate on the Sections is correct.

Appellate Side.

Proceedings, 1st May 1872.

1872. *May 1.*

UPON a reference by the District Magistrate of Salem of certain Proceedings of the 1st Class Sub-Magistrate of the Kristnagiri Taluq as contrary to law,

The High Court made the following

When the evidence upon which a prisoner is convicted by a subordinate tribunal of an offence within its jurisdiction discloses an offence of a graver character without the jurisdiction of that tribunal, the High Court may quash the conviction and sentence for the minor offence and direct a trial before a tribunal having jurisdiction for the graver. Whether it will do so, or not, is a question, not of law, but of expediency on the facts of the particular case.

RULING :—In this case the defendant preferred a false charge of house-breaking with intent to commit theft before the Police and the Village Magistrate. The Sub-Magistrate tried and convicted him of giving false information to a public servant, an offence punishable under Section 182 of the Penal Code.

The District Magistrate refers the case on the ground that an offence under Section 211 of the Penal Code was committed, and that the Sub-Magistrate should have held a preliminary enquiry into the case instead of disposing of it himself.

1872. *May 1.*

There is nothing illegal in the sentence itself. The prisoner had committed the offence of which he was convicted, and the Sub-Magistrate had jurisdiction over it. It has been held after much consideration, and after a full review of the difficulties felt elsewhere, that, where the evidence discloses an offence of a graver character without the jurisdiction of the tribunal, this Court may quash the conviction and sentence for the minor offence and direct a trial before a tribunal having jurisdiction for the graver. It has also been repeatedly held that whether it will do so or not is a question, not of law, but of expediency on the facts of the particular case. The present seems to the Court a case in which such interference is not expedient.

Appellate Side.

Proceedings, 4th June 1872.

1872. *June 4.*

UPON reading a letter from the Magistrate of Malabar referring, at the request of the Joint Magistrate, certain Proceedings of the 2nd Class Sub-Magistrate of Taliparamba in Case No. 34 of 1872, as contrary to law,

The High Court made the following

The jurisdiction conferred on Magistrates in the Madras Presidency by Madras Act III of 1865 is not ousted by the Schedule to the Code of Criminal Procedure as amended by Act VIII of 1869.

RULING :—In this case a Sub-Magistrate of the 2nd Class convicted the accused, under Section 5 of Act XXXI of 1860, of manufacturing and attempting to sell gunpowder without a license, and sentenced him to rigorous imprisonment and fine. The Joint Magistrate was of opinion that notwithstanding Madras Act III of 1865, the Sub-Magistrate had no jurisdiction over the offence by virtue of the Schedule to the Code of Criminal Procedure as amended by Act VIII of 1869, which ousts the jurisdiction of a Sub-Magistrate over offences against special or local laws, unless the offence is punishable with fine only, or with imprisonment for less than one year.

Madras Act III of 1865 is an Act which confers on Magistrates in the Madras Presidency jurisdiction to the extent of their ordinary powers in respect of offences created by special and local laws in force in the said Presidency. "Generi per speciem derogatur" is peculiarly true of the construction of statutes. A law dealing with a specific matter and giving jurisdiction over that matter cannot be repealed by a general provision such as

that contained in the Schedule. The Proceedings of the Sub-Magistrate were therefore legal, and there is no necessity for the interference of the High Court.

1872. June 4.

Appellate Side.

Proceedings, 13th June 1872.

1872. June 13.

UPON reading a letter from the Magistrate of Malabar, referring certain Proceedings of the 2nd Class Subordinate Magistrate of Cherakal, as contrary to law,

The High Court made the following

Accused, a Police Constable, was on duty at the outer gate of a Central Jail. Quitting his post inside the gateway and leaving the gate open he went to sleep outside. For this violation of duty he was convicted and sentenced under Sec. 44 of Act XXIV of 1859. *Held*, that the conviction was legal.

RULING :—In this case the Subordinate Magistrate convicted the accused (a Police Constable) under Section 44 of Act XXIV of 1859, and sentenced him to 20 days' rigorous imprisonment. The Magistrate refers the case on the ground that it is governed by the Proceedings of 9th August 1871(*a*), and that the conviction is illegal.

The facts of the case are that the Police Constable was on duty at the outer gate of the Central Jail. Quitting his post inside the gateway and leaving the gate open he went to sleep outside. For this violation of duty he was convicted and sentenced.

Section 44 provides penalties for Police officers "who shall be guilty of any violation of duty or wilful breach of any lawful orders and regulations not punishable under Section 10" of the Act.

It now appears that no rules for the punishment of violations of duty of the kind abovementioned have been sanctioned under the provisions of the 10th Section. Moreover, the Section itself only authorises the making of rules for the summary punishment by the Inspector General and the Deputy Superintendent of any Police Officer whom they shall think "remiss or negligent in the discharge of his duty," words which hardly suffice to comprehend grave violations of duty by Police Officers.

In the opinion of the majority of the Court a conviction under Section 44 on the facts above stated is legal. There is therefore no necessity in the present case for the interference of this Court.

(*a*) Reported 6 M. H. C. R. App. xxxi.

Appellate Side.

Proceedings, 29th June 1872.

1872. *June* 29.

UPON reading a letter from the Acting Magistrate of Bellary, referring certain Proceedings of the 1st Class Sub-Magistrate of Adoni as contrary to law,

The High Court made the following

RULING:—In this case the Sub-Magistrate convicted the accused under Section 25 of Act XVIII of 1854. The offence described is one punishable with transportation for life, or imprisonment for any term not exceeding seven years.

Accused was tried and convicted by a Sub-Magistrate of an offence under Section 25 of Act XVIII of 1854, punishable with transportation for life or imprisonment for any term not exceeding seven years. Upon a reference, *Held*, that by virtue of Madras Act III of 1865, the Sub-Magistrate had jurisdiction, that Act not being repealed by the Schedule attached to Act VIII of 1869.

The Magistrate refers the case on the ground that the Sub-Magistrate's jurisdiction was ousted by the Schedule attached to Act VIII of 1869, by virtue of which an offence punishable with transportation is triable exclusively by the Court of Session.

In the Proceedings of 2nd April 1868,(*a*) it was held that Madras Act III of 1865 conferred on any Magistrate the power to take cognisance of any offence committed against any special or local law, notwithstanding any provision to the contrary in any Act or Regulation, provided only that the several grades of the Magistracy should not exceed the limits of their ordinary jurisdiction as to the amount of punishment they might inflict. The Act is a special law and without express words cannot be repealed by a law of more general scope, such as is contained in the Schedule to Act VIII of 1869. It is impossible, therefore, to say that the Sub-Magistrate acted without jurisdiction, though the Court are clearly of opinion that a discreet exercise of the powers vested in the Sub-Magistrate would have led to his committal of a case of this serious character to the Court of Session.

Appellate Side.

Proceedings, 30th July 1872.

1872. *July* 30.

UPON reading certain Proceedings of the Session Court of Cuddalore, reviewing the Proceedings in Calendar Case No. 28 of 1872 on the file of the Acting Head Assistant Magistrate of South Arcot,

(*a*) See 4 M. H. C. R. Ap. ix.

1872. *July* 30.

The High Court made the following

RULING:—The Acting Head Assistant Magistrate decided that no prosecution could lie under Section 29 of Act XVIII of 1869 for an evasion of the stamp duties imposed by Act X of 1862, and that, Act X of 1862 having been repealed by Section 2 of Act XVIII of 1869, no prosecution could lie under that Act for an offence committed against its provisions.

By Section 6 of Act I of 1868 an offence committed under Section 3 of Act X of 1862, when that enactment was in force, is still an offence and may be tried under that enactment. By force of Section 3, Clause 1, of Act I of 1868, the mere repealing of Section 2 and Schedule 3 of Act XVIII of 1869 by Act XIV of 1870 did not *per se* revive the repealed portions of Act X of 1862.

On review of the said Proceedings the Session Judge expressed his concurrence in this view of the law.

It appears to the High Court that both the Lower Courts have fallen into an error by overlooking the provisions of Act I of 1868. Section 6 of that enactment provides that the repeal of an Act shall not affect any offence committed before the repealing Act shall have come into operation. If, therefore, any offence was committed under Section 3 of Act X of 1862, when that enactment was in force, that is still an offence and may be tried under that enactment.

With reference to the other observations of the Head Assistant Magistrate, it is sufficient to call attention to Section 3 (1) of Act I of 1868, which provides that for the purpose of reviving either wholly or partially a Statute, Act, or Regulation repealed, it shall be necessary expressly to state such purpose.

The mere repealing of Section 2 and Schedule 3 of Act XVIII of 1869 by Act XIV of 1870 did not, therefore, *per se* revive the repealed portions of Act X of 1862.

The order of the Assistant Magistrate dismissing the complaint against Mari Chetti and Armuga Pattan (that complaint being under Section 29, Act XVIII of 1869) is not in itself erroneous. But a fresh enquiry should be held and the charge alleged against them investigated with reference to the provisions of the former Act.

Appellate Side.

Proceedings, 14th August 1872.

1872. *August* 14.

UPON reading a letter from the Acting Magistrate of Bellary, referring certain Proceedings of the 1st Class Sub-Magistrate of Hospett as contrary to law,

The High Court made the following

RULING:—In this case the Sub-Magistrate convicted the accused under Clause 1, Section 48 of Act XXIV of 1859 (Police Act). The facts found were that the defendant rode an untrained bullock, which he could not control, in the public street.

Accused was convicted under Clause 1, Section 48 of the Police Act. The facts found were that he rode an untrained bullock, which he could not control, in the Public Street. *Held*, that the evidence warranted the conviction.

The Deputy Magistrate was of opinion that there was no evidence of reckless or furious riding to the danger of passers by, and referred the case for the orders of the High Court.

It appears to the High Court that there is no ground for its interference. The riding of an untrained bullock on the public road appears to be training it, and the fact that it will gore any one who approaches it, capital evidence that the training is going on to the danger of the passers by.

Appellate Side.

Proceedings, 21st August 1872.

1872. *August* 21.

UPON reading a letter from the Acting Magistrate of Bellary, referring certain Proceedings of the 2nd Class Sub-Magistrate of Harpanhalli, as contrary to law,

The High Court made the following

RULING:—In this case the Sub-Magistrate convicted six persons of disobedience to summonses issued by him as Tahsildár under Madras Act III of 1869. The summonses required the attendance of the defendants before the Revenue Inspector.

Madras Act III of 1869 does not authorise a Tahsildár to issue a summons to any person to appear before any other person than himself.

On the ground that Madras Act III of 1869 does not authorize a Tahsildár to issue a summons to any person to appear before

any other person than himself, the summonses in this case were illegal. 1872. *August* 21.

The convictions must be quashed and the fines levied refunded.

Appellate Side.

Proceedings, 4th November 1872.

UPON reading a letter from the Magistrate of Cuddapah, referring certain Proceedings of the 2nd Class Sub-Magistrate of Pullampett Taluq as contrary to law, 1872. *November* 4.

The High Court made the following

Madras Act III of 1869 is the only provision of the law, which authorizes a Tahsildár to issue a legal summons, disobedience to which would constitute an offence.

RULING:—In this case the Sub-Magistrate convicted the accused, under Section 174 of the Penal Code, for disobedience to summonses. The summonses were issued by the Sub-Magistrate as Tahsildár on a complaint preferred to him, but not in the course of an enquiry which the Tahsildár was authorized to hold as a Revenue Officer.

Madras Act III of 1869 was, therefore, inapplicable, and there is no other provisions of the law which authorizes a Tahsildár to issue a legal summons, disobedience to which would constitute an offence.

The conviction must be quashed and the fines levied refunded.

Appellate Side.

Proceedings, 5th November 1872.

UPON reading certain proceedings of the Session Court of Bellary, reviewing (on appeal) the Proceedings in Calendar Case No. 124 of 1872 on the file of the Deputy Magistrate of Harpanhalli, 1872. *November* 5.

The High Court made the following

Upon the construction of Section 324 of the Penal Code—*Held*, that it is not necessary that the manner of use (of the weapon) must be such as is likely to cause death.

RULING:—It appears to the High Court that the view taken by the Acting Session Judge of Bellary of Section 324 of the Penal Code is erroneous. It is not necessary that the manner of use must be such as is likely to cause death. Such an element would compose a crime

1872. *November 5.* of a wholly different character. The object of Section 324 is to make simple hurt more grave and liable to a more severe punishment where it has the "differentia" of one of the modes of infliction described in the Section.

Appellate Side.

Proceedings, 12th November 1872.

1872. *November 12.* UPON reading a letter from the Acting Session Judge of Tanjore, referring certain Proceedings of the Town Sub-Magistrate of Combaconum as contrary to law,

The High Court made the following

A Sub-Magistrate refused to grant sanction for a prosecution under Section 169 of the Criminal Procedure Code on the sole ground that the perjury was alleged to have been committed before his predecessor in office. *Held*, that the Sub-Magistrate was wrong in his construction of the Section. The Court before which the perjury is alleged to have been committed is to give the permission. The change of incumbent leaves it still the same Court.

RULING:—In this case the Sub-Magistrate refused to grant sanction for a prosecution under Section 169 of the Code of Criminal Procedure on the sole ground that the perjury was alleged to have been committed before his predecessor in office.

It appears to the High Court that the Sub-Magistrate is wrong in his construction of the section. The Court before which the perjury is alleged to have been committed is to give the permission. The change of incumbent leaves it still the same Court. The argument that only the person who tries the case can properly give the permission, because alone cognizant of the facts, is answered by the fact that the Appellate Court, to which the Court is subject, can also give it. The order of the Sub-Magistrate must be set aside, and he must be directed to dispose of the application before him on the merits.

Appellate Side.

Proceedings, 26th November 1872.

1872. *November 26.* UPON reading a letter from the Judicial Commissioner of the Nilgiris, referring certain Proceedings of the Joint Magistrate of Wellington,

1872. November 26.

The High Court made the following

RULING :—In this case the Joint Magistrate held proceedings against one Sámi under Act XIII of 1859. The contract alleged was that Sámi agreed to supply skins to complainant and the breach a failure to supply.

A butcher contracting to supply skins is not within Act XIII of 1859.

The High Court agree with the Judicial Commissioner that a butcher contracting to supply skins is not within the Act. The order must be set aside as illegal.

Appellate Side.

Proceedings, 3rd December 1872.

1872. December 3.

UPON reading a letter from the District Magistrate of Salem, referring, at the request of the Head Assistant Magistrate, certain Proceedings of the 2nd Class (Sheristadar) Sub-Magistrate of the Tripatore Taluq as contrary to law,

The High Court made the following

RULING :—In this case the Sub-Magistrate convicted the accused of theft of some bullocks and sentenced them each to rigorous imprisonment for 25 days and to pay fines, the 1st prisoner 12 Rupees and the other prisoners 6 Rupees each. Under Section 44 of the Criminal Procedure Code he directed that the fines, if collected, should be paid to the 6th witness as compensation for having to return the bullocks which he had purchased to the complainant.

The accused were convicted of theft of some bullocks and fined. Under Sec. 44 of the Criminal Procedure Code, the Magistrate directed that the fines, if collected, should be paid to the 6th witness as compensation for having to return the bullocks which he had purchased to the complainant. *Held*, that this order was bad. The sale to the 6th witness was not "the offence complained of" within the meaning of Sec. 44.

The order of the Sub-Magistrate is bad. The sale to the 6th witness was not "the offence complained of" within the meaning of Section 44. It is accordingly ordered that the Sub-Magistrate's order be quashed.

The High Court cannot refrain from observing that the punishment inflicted is, in their opinion, wholly inadequate to the offence committed.

Appellate Side.

Proceedings, 20th December 1872.

1872. *December* 20.

UPON reading a letter from the Acting Session Judge of Cuddapah, referring certain Proceedings of the Magistrate of Cuddapah as contrary to law,

The High Court made the following

Accused was convicted, under Section 174 of the Penal Code, of disobedience to a summons addressed to him as defendant in a suit brought before the Collector under Reg. VI of 1831. The summons did not specify the place at which his attendance was required. *Held,* that on this ground the conviction was illegal.

RULING :—In this case the Sub-Magistrate convicted the accused of disobedience to a summons punishable under Section 174 of the Penal Code. The summons was addressed to the defendant as defendant in a suit brought before the Collector under Regulation VI of 1831. The summons did not specify the place at which his attendance was required.

On this ground the conviction was illegal and must be quashed.

Appellate Side.

Proceedings, 24th January 1873.

1873. *January* 24.

UPON reading the Calendar and record of Case No. 35 of 1872, on the file of the Session Court of Nellore,

The High Court made the following

Section 30 of the Indian Evidence Act (I of 1872) is an exception, and its wording shows that the confession is merely to be an element in the consideration of the evidence. Unless there is something more, a conviction upon it will still be a case of no evidence and bad in law.

RULING :—In this case two persons have been convicted under Sections 312 and 203 of the Penal Code. There is not a particle of evidence against the 2nd prisoner except the confession of the co-prisoner, which by Section 30 of the Evidence Act may be "taken into consideration."

Section 30 is an exception, and its wording shows that the confession is merely to be an element in the consideration of the evidence. Unless there is something more, a conviction upon it will still be a case of no evidence and bad in law. In the present case the false information depends upon the existence of the offence, and as to it the case fails with the absence of evidence as to the 2nd prisoner of that offence.

This being a case of no evidence against the 2nd prisoner, the conviction must be quashed and the prisoner released.

Appellate Side.

Proceedings, 14th March 1873.

1873. *March* 14.

UPON reading a letter from the Acting Magistrate of Bellary, referring for the orders of the High Court, under Section 296 of the Code of Criminal Procedure, the Proceedings of the Cantonment Magistrate of Bellary in Case No. 565 of 1872, as contrary to law,

The High Court made the following

Beer is not included in the term "spirituous liquor," as used in Section 30 of Madras Act I of 1866.

RULING :—In this case the defendant was charged with selling liquor to a soldier in the Cantonment of Bellary without a license, an offence punishable under Section 30 of Madras Act I of 1866.

(a.) Section 30, Madras Act I of 1866, is as follows—

"If within any Military Cantonment, or within any limits around such Cantonment prescribed by the Government, any person not amenable to the

1873. March 14.

The Cantonment Magistrate discharged the accused on the ground that country beer—the article sold—was not "spirituous liquor" within the meaning of the Act.

The High Court are of opinion that there is no ground for their interference. Home made beer does not fall strictly within the Section, and in an enactment so highly penal the enumeration of *wine* precludes the interpretation that beer is included in the generic term "spirituous liquor."

Appellate Side.

Proceedings, 19th March 1873.

1873. *March* 19.

UPON the question from the Officiating Magistrate of Tanjore, whether a Sessions Judge has power, under Section 298 of the Code of Criminal Procedure, to direct a Magistrate to enquire into a complaint dismissed by him under Section 67 of the old Code, or the corresponding Section 147 of the present Code,

The High Court made the following

A Court of Session has power to direct a Magistrate to enquire into a complaint dismissed by him under Section 67 of the old Code of Criminal Procedure, or the corresponding Section 147 of the present Code.

A District Magistrate is not bound to forward to the High Court the objections of his Assistant to an order of the Session Court.

RULING:—The High Court have no doubt that the Court of Session has the power. Section 37 merely limits the powers of interference of the Sessions Court to those expressly given by the Act. It does not say that Magistrates' Courts are not still subordinate to the Sessions Court. Then Section 295 gives the Court of Session the power of calling for the records of any Court subordinate to it for certain purposes. Section 298 gives in the most

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Articles of War, or any Sutler or Camp-follower, shall knowingly barter, sell, or supply, or offer, or attempt to barter, sell, or supply any spirituous liquor, wine, or intoxicating drug, to or for the use of any European soldier, or to or for the use of any European or Eurasian being a Camp-follower or a soldier's wife, without a written license from the Officer Commanding, or from some person having sufficient authority from the Officer Commanding to grant such license, the person so bartering, selling, or supplying, or offering, or attempting to barter, sell, or supply such spirituous liquor, wine, or intoxicating drug as aforesaid, shall be liable, on conviction, to a fine not exceeding one hundred Rupees, or, in the discretion of the Magistrate, to imprisonment, with or without hard labour, for any period not exceeding three months, or in lieu of such fine or imprisonment to the punishment of whipping, as prescribed by Section 10 of Act VI of 1864 (*to authorize the punishment of whipping in certain cases*) subject to all the provisions of that Act.

general terms the power to three tribunals of directing an investigation of a dismissed complaint. It is a mere continuation of Section 295. 1873. *March* 19.

As regards the question raised by the District Magistrate, viz., whether he was bound to refer this question at the instance of his Assistant whatever his own opinion might be, it appears to the High Court that the Magistrate was certainly not bound to forward the objections of his Assistant to an order of the Session Court, and more particularly where he himself agreed with the view of that Court.

Appellate Side.

Proceedings, 24th March 1873.

UPON reading a letter from the Session Judge of Tinnevelly, referring, under Section 296 of the Code of Criminal Procedure, the Proceedings of the Acting Head Assistant Magistrate in Case No. 16 of 1873, as contrary to law, and also a letter from the Session Judge of Salem, referring under the same Section, certain Proceedings of the District Magistrate of Salem, 1873. *March* 24.

The High Court made the following

RULING:—In the case from Tinnevelly, the accused appeared before the Magistrate and gave a deposition in a summary suit under an assumed name. He was accordingly tried and convicted under Section 205 of the Penal Code.

With the exception of cases triable by the Court of Session exclusively, a Court cannot try any offence described in Sections 467, 468 and 469 of the Code of Criminal Procedure, when committed before itself.

In the case from Salem, the accused gave false evidence in a judicial proceeding before the Assistant Magistrate; and the Assistant Magistrate forwarded the case for trial to the District Magistrate under the provisions of Sections 471 and 473 of the Code of Criminal Procedure. The District Magistrate remanded the case to his Assistant with instructions to try it himself, or commit it for trial to the Court of Session. The Assistant Magistrate demurred and requested a reference to higher authority.

The question for consideration is whether a Magistrate has power to try a person committing one of the offences enumerated in Sections 467, 468 and 469 of the Code of Criminal Procedure when committed before his own Court.

1873. *March 24.*

Section 471 plainly provides that, with the exception of cases triable by the Court of Session exclusively (472), the tribunal which is of opinion that there is sufficient ground for enquiring into any such charge is to be other than the tribunal which is to try for the offence.

Section 473, which is altogether a new Section, has an enforcing influence in favor of this construction of Section 471.

It is true that the words are "in contempt of its own authority," and that they would narrow the prohibition to cases falling within Cap. X of the Penal Code; but Section 435 embraces also Section 228 of the Penal Code which is in Cap. XI (Offences against public justice). Further, Section 472 is treated as a limitation of the prohibition of a Court trying "offences committed in contempt of its own authority." Now the Court of Session has not exclusive jurisdiction over any offence in Cap. X of the Penal Code. It seems clear, therefore, that, although by most inapt words, the Legislature intended to extend the prohibition, save in the excepted cases, to all offences mentioned in Sections 467, 468 and 469.

The result is that save in these cases a Court cannot try any offence described in Sections 467, 468 and 469 when committed before itself.

The conviction and sentence by the Head Assistant Magistrate in the Tinnevelly case must be set aside as made without jurisdiction. In the Salem case the District Magistrate must be directed to proceed with the trial of the case referred to him by the Assistant Magistrate according to law.

Appellate Side.

Proceedings, 18*th February* 1873.

1873. *February* 18.

UPON reading a letter dated the 31st January 1873, from the Session Judge of Salem, referring the Proceedings of the Assistant Magistrate in Case No. 4 of 1873, as contrary to law,

The High Court made the following

Accused was convicted by an Assistant Magistrate, of theft of paddy. The facts found were that prisoner was found in possession of rice not thrashed in the usual way, and that having no paddy land of his own, he failed to account satisfactorily for the possession of the rice. *Held*, that this was such a case as no Judge would leave to a Jury, and that the conviction must be quashed as founded upon evidence, which, if all true, would not justify the inference of guilt.

The meaning of the term "corpus delicti" explained.

RULING:—In this case the Assistant Magistrate convicted the accused of theft of some paddy. The facts found are that the prisoner was found in possession of rice not thrashed in the usual way and that, having no paddy land of his own, he failed to account satisfactorily for the possession of the rice. The Session Judge refers the proceedings as illegal on the ground that there is no evidence of the "corpus delicti."

The Session Judge has used the term "corpus delicti" without clearly understanding it, and it will therefore be as well to explain the meaning that properly attaches to it before proceeding to dispose of this case. The term "corpus delicti" is an invention of the jurists of the middle ages and was used by them to denote the whole of the facts which constituted the crime of killing when the body of the killed had been found. A mixture of German and Roman views led to the proposition (which has found its way into English Penal Law) that the proof of the aggregate of facts constituting the offence failed when the body was not found. The expression was then extended to other offences and was used to denote that the qualities necessary to bring a fact within the operation of a rule of Criminal Law had been shown to attach to that fact. The jurists of the middle ages, however, never conceived the dead body, in murder, or the object stolen in theft, to be that "corpus." The expression itself has many vices, but in the sense in which its authors used it is at least intelligible.

The question here is whether the conviction is bad in law, on the legal objection that there is no evidence,

1873. February 18.

It is undoubtedly such a case as no Judge would leave to a jury. A matter not identifiable is found in the possession of a man, who gives an account of it which he does not prove.—The failure to prove may arise from the falsity of the account. It may arise from the unwillingness of the witnesses to speak in favor of a pariah cooly whose house had been searched because he was suspected of thefts.

Supposing the matter to have been stolen, it may have been stolen elsewhere. The legislature has left us the problem.—When a prudent man ought to consider the existence of a fact, which he does not believe, so probable that he ought, "in the circumstances of the case" to act upon the supposition that it exists. When thus broadly stated it can only be supposed that the man who does not believe it, is an imprudent man, for it is difficult to see how a man can be said to be prudent who acts upon the hypothesis of an existence in which he does not believe.

The section seems to be an unsuccessful attempt to classify measures of proof and is in form a travesty of the rule always put to juries in cases of circumstantial evidence.—"Are the probative "facts such as create in your mind such assurance of the fact to "be proved as would cause you to act upon it as true, in the most "important concerns of your own life? Are the facts such as to "exclude every hypothesis consistent with innocence (*i. e.*, of "the offence charged) which upon the facts of this case you can "reasonably entertain?" If so, the Judge does not say, "Act "upon it as if you belived it when you do not, but believe it." In moral evidence there are no certainties but never more than a high degree of probability. There is no case in which some votary of mathematics would not be able to show that the evidence falls short of demonstration. If such a rule as this was to find its place in an Evidence Act, it requires for safety much more careful expression. The circumstances of the case are to determine the measure of proof required.

A reference was probably intended to the well known rule that where it is a civil case, it is not only justifiable but commendable to act upon a balance of probability in favor of a fact at issue, which in a criminal case it would be wholly improper to treat as amounting to proof of that fact, if the guilt of a prisoner depended upon its establishment. Against the rule thus limited

there is nothing to say. In this criminal case however the whole of the evidence taken together, even if held to exclude reasonable hypothesis of absolute innocence (and this would be rather a dangerous step) is by no means such as to exclude reasonable hypothesis of his innocence of *this* theft. 1873. *February* 18.

The conviction must be quashed as founded upon evidence which, if all true, would not justify the inference of guilt. It is therefore a case of no evidence and the prisoner must be released.

Ordered accordingly.

Appellate Side.

Proceedings, 3*rd April* 1873.

The order of the High Court, of 30th August 1871, respecting the period of issuing orders confirming sentence of death, after receipt of the record, is no longer in force.

Section 271 of the Code of Criminal Procedure provides that when a person is sentenced to death, the Sessions Court shall enquire whether he wishes to appeal, and if he signifies his intention to appeal, the Court shall inform him that his appeal must be made within seven days, and shall delay the transmission of the reference, hereinafter required, for a reasonable time, not exceeding seven days, to allow of the appeal and reference being made at the same time. 1873. *April* 3.

When it appears that the execution of the sentence should not be delayed, the Sessions Court may record its reasons and forward the reference at once.

The same Section further provides that in no case requiring confirmation shall the High Court grant a longer delay than is herein allowed for the presentation of an appeal.

The Order of the Court contained in the Proceedings of 30th August 1871, (*a*) which is opposed to this express provision of the law can, therefore, no longer be considered in force. Sessions Judges should be careful to note in their letter of reference whether the prisoner has signified his intention to appeal.

(*a*) "*No order confirming a sentence of death shall be issued from the High Court until after the lapse of* 30 *days from the date of the receipt of the record in the Registrar's Office.*"

Appellate Side.

Proceedings, 24th April 1873.

1873. *April* 24.

UPON reading a letter from the Acting Magistrate of North Arcot, referring the Proceedings of the Assistant Magistrate in Case No. 60 of 1872, as contrary to law,

The High Court made the following

Accused was convicted under Section 48 of Act XXIV of 1859 and sentenced to pay a fine or, in default, to be imprisoned. *Held*, on the authority of the Proceedings of 7th December 1866, that the award of imprisonment in default of payment of fine was irregular.

The Rulings reported at 5 M. H. C. R. App. xxi and xxiii, over-ruled.

RULING :—In this case the accused was convicted under Section 48 of Act XXIV of 1859 and sentenced to pay a fine of 5 Rupees or in default to undergo simple imprisonment for 48 hours.

The Acting District Magistrate was of opinion that the sentence was illegal, as no provision is made in the Act for awarding imprisonment in default of payment of fine.

On the authority of the Proceedings dated 7th December 1866 (*a*) the award of imprisonment in default of payment of fine in this case is irregular. The procedure for recovering the fine is laid down in Madras Act V of 1865.

The Judges are aware that it has been held in the Proceedings of 9th March 1870 and 1st June 1870, reported in 5 M. H. C. R. Appendix XXI and XXIII, that where there is a liability to fine and imprisonment the award of imprisonment in default of payment of fine is an informality but does not affect the legality of the sentence. On a full consideration they are however, of opinion that the Proceedings of 7th December 1866 should, in future, be followed.

The sentence in this case must be amended.

Ordered accordingly.

(*a*) Reported at 3 M. H. C. R. App. ix.

Appellate Side.

Proceedings, 14th July 1873.

UPON reading a letter from the Acting District Magistrate of Salem, submitting for the orders of the High Court certain correspondence between himself and the Sessions Judge, relating to the operation of the Rule of the 17th November 1868, which requires a copy of every order, made by a Magistrate under the Criminal Procedure Code, to be submitted to the Appellate Court to which the Magistrate is immediately subordinate for revision.

1873. *July* 14.

The High Court made the following

When the Appeal from an order of a 1st Class Magistrate lies to the District Magistrate (as in the case of orders passed under Section 504 of the Criminal Procedure Code) the copy of the order should be sent to him, and not to the Sessions Judge.

RULING:—The Sessions Judge maintains that under this rule copies of every order passed by a 1st Class Magistrate must be submitted to him, whilst the Acting District Magistrate contends that where the appeal lies to the District Magistrate, as in the case of orders passed under Section 504 of the Code of Criminal Procedure (Vide Section 267), the copy should be sent to him and not to the Sessions Judge.

It appears to the High Court that the Acting Magistrate is correct, and that the words of the order of 17th November 1868 must be taken in their literal sense. The new Code has materially altered the relation of the Session Judge to the Magistracy. Section 37 subordinates all the Magistrates in a District to the District Magistrate but not to the Sessions Judge. Then Section 295 gives the Court of Session power to call for the record of any Court subordinate to it for certain purposes only.

In the case which gave rise to this correspondence the Assistant Magistrate's order under Section 504 was properly sent to the District Magistrate for revision. The observations made on it by the District Magistrate were properly sent to the Court of Session and when the Session Judge sent for a copy of the original order, it appears to have been furnished to him.

Appellate Side.

Proceedings, 1st August 1873.

1873. *August* 1.

UPON reading a letter from the Acting Magistrate of the Godavery District referring, for the orders of the High Court, the Proceedings of the 3rd Class Magistrate of Pentapadu in Case No. 46 of 1873, as contrary to law,

The High Court made the following

Section XXII of Act I of 1871 does not provide for a fine in addition to compensation.

RULING :—In this case the 3rd Class Magistrate convicted the accused under Section XXII of Act I of 1871 and fined him 4 Rupees, of which 3 Rupees 4 Annas was awarded as compensation to the complainant and 12 Annas credited to Government.

The Acting Magistrate refers the sentence as illegal so far as it adjudged the defendant to pay more than was awarded as compensation to complainant.

The Section does not seem to provide for a fine in addition to compensation. The 12 Annas collected from defendant and credited to Government must be refunded to him.

Appellate Side.

Proceedings, 24th March 1873.

UPON reading a letter, dated the 26th February 1873, from the Acting Magistrate of South Arcot, referring certain proceedings of the 2nd Class Magistrate of Virdachellam as contrary to law,

1873. *March 24.*

The High Court made the following

Accused was convicted by a 2nd Class Taluq Magistrate of insult with intent to provoke a breach of the peace. No formal complaint was entered in the record until after sentence was passed. The 2nd Class Magistrate not being authorized to entertain cases without complaint, the District Magistrate submitted that the whole proceedings were void under Section 34, Clause 2, of the Code of Criminal Procedure. *Held* that the 2nd Class Magistrate could not be said to have entertained the case without complaint, but that he acted in violation of Section 144 in not reducing it to writing, and that, under Section 283, an Appellate Court would have no power to reverse the judgment or sentence on the ground of this irregularity.

RULING:—In this case the 2nd Class Taluq Magistrate of Virdachellam convicted the accused of insult with intent to provoke a breach of the peace and sentenced him to pay a fine of 1 Rupee. No formal complaint was entered in the record until after sentence was passed.

The 2nd Class Magistrate was not authorized to entertain cases without complaint, and the District Magistrate submits that the whole proceedings were void under Section 34, Clause 2.

It appears to the High Court that the 2nd Class Magistrate cannot be said to have entertained the case without complaint, but that he acted in violation of Section 144 in not reducing it to writing. Under Section 283 an Appellate Court would have no power to reverse the judgment or sentence on the ground of this irregularity. Revision is restricted to the cases specifically mentioned (297), and this case is not among them. Moreover Section 300 extends the provisions of Section 283 to revision orders. It would indeed be curious if matter could be used for the procuring of revision which would be unavailable in appeal. The Court have not overlooked the inference derivable from the express provision at the close of Section 144, that one of the two sets of formalities being neglected shall not be a ground for setting aside the trial, but they cannot think that this can be allowed to overrule the plain provisions of the law on the matter of revision and appeal.

1873. *August* 4.

Appellate Side.

Proceedings, 4th August 1873.

UPON reading certain proceedings of the Sessions Court of North Arcot, dated the 5th July 1873, reviewing the proceedings of the Head Assistant Magistrate of North Arcot,

The High Court made the following

RULING :—The Acting Session Judge observes that the Head Assistant Magistrate had no power to order a Subordinate Magistrate to submit amended proceedings.

A Head Assistant Magistrate has no power to order a Subordinate Magistrate to submit amended proceedings: but if the Sub-Magistrate be a Magistrate subordinate to the Head Assistant Magistrate, under Sec. 41 of the Code of Criminal Procedure, the latter may call for explanation of his subordinate's proceedings.

Assuming that the Magistrate from whom the papers were required was a Magistrate subordinate to the Head Assistant Magistrate, under Section 41 of the Code of Criminal Procedure, there seems no objection to the latter calling for explanation of his subordinate's proceedings. Copies of these proceedings are required to be submitted to the Appellate authority—that is, in the present case, the Head Assistant Magistrate, under the Rule of the High Court, dated 17th November 1868, which is still in force under Section 2 of the Code of Criminal Procedure.

Appellate Side.

Proceedings, 5th August 1873.

1873. *August* 5.

UPON reading certain proceedings of the Sessions Court of Kurnool reviewing (on appeal) the proceedings in Register Case No. 1 of 1873 on the file of the 2nd Class Magistrate of Koilkoontla,

The High Court made the following

RULING :—The Sessions Judge lays down that a document which has not been stamped, and is not, therefore, receivable in evidence cannot be a "valuable security," within the meaning of Section 477 of the Penal Code.

The fact that a document has not been stamped, and is not, therefore, receivable in evidence, does not prevent its being a "valuable security" within the meaning of Section 477 of the Penal Code.

The words "purports to be" in the section make the law of this country upon this matter what it has in a long succession of cases been held to be in England. The cases as to the absence of a stamp being insufficient to deprive the document of its character

of a valuable security in the view of penal law are all collected at II, Russ. C. and M. 751, *et seq* (see East's Pleas of the Crown, p. 956.) 1873. *August* 5.

In the present case, therefore, the grounds upon which the prisoner has been discharged are invalid in law, and if the case was dismissed on this point only, the order of the Sub-Magistrate must be quashed and a trial ordered.

Appellate Side.

Proceedings, 18th August 1873.

UPON reading the proceedings of the Sessions Court of North Arcot, dated the 26th and 29th July 1873, reviewing the proceedings held by the Deputy Magistrate in Calendar Cases Nos. 149, 150 and 151 of 1873 on the file of the Subordinate Magistrate of Poloor Taluq, 1873. *August* 18.

The High Court made the following

A Sessions Judge has no power to direct a Division Magistrate to cancel his proceedings reviewing the Calendars of Magistrates subordinate to him.

RULING :—In these and in some other cases the Sessions Judge has directed the Division Magistrate to cancel his proceedings reviewing the Calendars of Magistrates subordinate to him.

It appears to the High Court that such action on the part of the Sessions Judge is not authorized by the Code of Criminal Procedure. Under Section 297 of the Code of Criminal Procedure no Court other than the High Court can alter any sentence or order of a Subordinate Court, except as provided in Sections 328 and 398, and except upon appeal by the parties concerned. Reading Sections 37, 40, 41 and 295 of the Code, it seems clear that the Magistracy are subordinate to the Sessions Court only for the purpose of reference to the High Court in cases in which revision is required. The duty of criticising the proceedings of the Subordinate Magistracy is a duty devolving on the Superior Magistracy and not on the Sessions Court.

Appellate Side.

Proceedings, 5th November 1873.

UPON reading a letter from the District Magistrate of Salem referring for the orders of the High Court, under Section 296 of the Code of Criminal Procedure, the proceedings of the Sessions Court held in the Case No. 49 of 1873, on the file of the Assistant Magistrate of Salem, as contrary to law, 1873. *November* 5.

1873.
November 5.

The High Court made the following

RULING:—In this case a complaint was preferred before the Assistant Magistrate against two persons of an offence punishable under Section 409 of the Penal Code. The Assistant Magistrate held an enquiry and discharged the accused under Section 215 of the Code of Criminal Procedure. Subsequently the Sessions Court on a perusal of the proceedings directed their committal under Section 296 of the Code of Criminal Procedure.

A complaint was preferred before the Assistant Magistrate against two persons of an offence punishable under Sec. 409 of the Penal Code. After enquiry they were discharged under Sec. 215 of the Code of Criminal Procedure. Subsequently the Sessions Court directed their committal under Sec. 296. *Held*, that the order of the Sessions Court was *ultra vires*.

The Magistrate is of opinion that the order of the Sessions Court was *ultra vires*.

In that opinion the High Court concur. Section 296 read with the definition of "Sessions Case" in Section 4 narrows the power to direct a committal to cases which have been investigated as a preliminary to committal. The order to commit was clearly bad in law.

It is unnecessary however to interfere further for the Magistrate used the option which belonged to him and chose to commit.

Appellate Side.

Proceedings, 6th November 1873.

1873.
November 6.

UPON reading a letter from the Acting Sessions Judge of Nellore referring certain proceedings of the Acting Head Assistant Magistrate of Nellore, as contrary to law,

The High Court made the following

RULING:—In this case the Acting Head Assistant Magistrate convicted the accused of abetting the giving of false evidence in a judicial case proceeding before himself.

The Magistrate convicted accused of abetting the giving of false evidence in a judicial case proceeding before himself. *Held* that, as by the proceedings of 24th March 1873, the Magistrate could not have tried the person who gave false evidence, he could not try the abettor.

On the authority of the proceedings dated 24th March 1873, (*a*) it is clear that the Head Assist-

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(*a*) Reported VII, M. H. C. R. App. XVII.

ant Magistrate could not have tried the person who gave false evidence, and it appears to the High Court that the prohibition extends equally to the abettor. 1873. *November 6.*

The conviction and sentence must be quashed as illegal.

Appellate Side.

Proceedings, 7th November 1873.

UPON the question from the Acting District Magistrate of Trichinopoly, whether he is authorized, on the application of an appellant's Pleader, to set aside an order passed under Section 278 of the Code of Criminal Procedure, rejecting an Appeal, on the ground that notice of the day fixed for the hearing of the Appeal did not reach the Pleader in time for him to appear, 1873. *November 7.*

The High Court made the following

When a Criminal Appeal has been rejected without hearing the Appellant's Pleader, and it is afterwards proved to the satisfaction of the Appellate Court that an adequate excuse has been made for the Pleader's non-appearance, it is open to the Appellate Court to rehear the Appeal on its merits.

Ruling:—Section 278 of the Code of Criminal Procedure requires the Appellate Court to give a reasonable time for the appearance of the Appellant or his Counsel or authorized agent, and if one of these appears, to hear him before rejecting the Appeal. When an Appeal has been rejected without hearing the Appellant's Pleader, and it is afterwards proved to the satisfaction of the Appellate Court that an adequate excuse has been made for the Pleader's non-appearance, it is open to the Appellate Court to re-hear the Appeal on its merits. Such a power should, however, be sparingly used.

Appellate Side.

Proceedings, 10th December 1873.

UPON reading a letter from the Acting District Magistrate of Salem referring for the orders of the High Court four sets of warrants issued under Sections 302 and 303 of the Code of Criminal Procedure by the Acting Head Assistant Magistrate, as contrary to law, 1873. *December 10.*

1873. *December* 10.

The High Court made the following

RULING :—The first warrant in each case awards a term of imprisonment, the 2nd warrant awards a certain number of lashes to be inflicted at the expiry of the term of imprisonment, and the third warrant awards a term of imprisonment to take effect after the sentence of whipping has been carried out.

The ruling of the High Court (Proceedings, 13th November 1871) reported at VI, M. H. C. R., Appendix XXXVIII, is still applicable to Section 310 of the new Criminal Procedure Code.

The questions raised are whether the postponement of the whipping to the end of the first term of imprisonment is legal, and if not legal whether the second term of imprisonment, which is ordered to take effect after the whipping, can be allowed to stand.

In the Proceedings of the High Court dated 13th November 1871, reported at VI, M.H. C. R., Appendix XXXVIII, it was held that a sentence of whipping could not be postponed beyond the term specified in Section 9 of Act VI of 1864, and that the order dreciting the postponement was illegal. That ruling is still applicable to Section 310 of the Criminal Procedure Code. The postponement of the part of the sentence relating to imprisonment does not warrant the postponement of that part of it which inflicts whipping beyond the period prescribed by the Act. The warrants in Calendar Cases Nos. 9 and 10 as they stand are bad in law, and it may further be observed that the warrants ought to embody the sentence and not contain a note in the shape of a Memorandum as to the period of inflicting the punishment. The warrants in Calendar No. 9 must be treated as nullities and those in Calendar No. 10 must be amended by directing the imprisonment to commence after the expiration of the imprisonment in Calendar No. 8.

Appellate Side.

Proceedings, 12th December 1873.

1873. *December* 12.

UPON reading a letter from the Magistrate of Malabar referring for the orders of the High Court certain proceedings of the 3rd Class Magistrate of Guddalur as contrary to law,

The High Court made the following

1873. *December* 12.

RULING:—In this case the complainant was a cultivator in Wynaad and the defendant, in consideration of an advance of Rupees 95 receivod from complainant, bound himself to work for the complainant until the re-payment of the amount advanced. For breach of this contract the complainant proceeded against the defendant under the provisions of Act XIII of 1859, and the 3rd Class Magistrate directed him to perform the work according to the terms of his contract.

Defendant, in consideration of an advance of money received from complainant, bound himself to work for complainant until the re-payment of the sum advanced. For breach of this contract complainant proceeded against defendant under Act XIII of 1859. *Held*, that the contract was not within the Act.

The District Magistrate refers the order as illegal on the ground that it sanctions a species of slavery.

It appears to the High Court that the contract is clearly not within the Act. A construction of the Act must not be adopted which would enforce a contract in the violation of a law of a more stringent nature. The order of the 3rd Class Magistrate must be quashed as being contrary to law.

Appellate Side.

Proceedings, 18*th December* 1873.

1873. *December* 18.

UPON reading a letter from the Acting Magistrate of Trichinopoly referring certain proceedings of the 3rd Class Magistrate of Kulitalei as contrary to law,

The High Court made the following

RULING:—In this case a complaint of theft of cocoanuts valued at 1 anna and 8 pies was made to the 3rd Class Magistrate, who returned the petition to the complainant with an endorsement that he should obtain redress from the Village Magistrate. The procedure of the Magistrate was unauthorized. A complaint having been made to him, he was bound to proceed under Section 144, &c. of the Code of Criminal Procedure, and dispose of the complaint according to law. The fact that the complaint was also cognizable by the head of the village did not affect the competency of the Magistrate, nor could he thus decline to exercise his jurisdiction.

A complaint of theft of cocoanuts valued at 1 anna and 8 pies was made to a 3rd Class Magistrate who returned the petition to the complainant, with an endorsement that he should obtain redress from the Village Magistrate. *Held*, that the procedure of the Magistrate was unauthorized.

1873. *December* 18.

The Acting District Magistrate's order that complaints of petty assaults should be dismissed by Subordinate Magistrates under Section 147 of the Code of Criminal Procedure when it appeared that the complaint should have been made to the head of the village is beyond his authority. If the provisions of the Court Fees' Act 1870 (See Secs. 18-19) and of the Rules made under the Act respecting Process Fees are found insufficient to induce complainants in such cases to resort to the head of the village rather than to the ordinary Criminal Courts, there is no legal prohibition against their making complaint to the Magistrates.

Appellate Side. (a)

Proceedings, 18*th December* 1873.

1873. *December* 18.

UPON a reference by the Sessions Judge of the South Malabar Division of certain proceedings of the Joint Magistrate of Cochin as contrary to law,

A majority of the High Court made the following

The Magistrate of Cochin, a Justice of the Peace but not a European British subject, convicted and sentenced a merchant seaman, a European British subject, for the offence of wilful disobedience to orders under Clause 4, Sec. 83 of Act I of 1859. *Held*, by a majority of the High Court, that by force of Section 72 of the Criminal Procedure Code (Act X of 1872) the Magistrate had no jurisdiction.

RULING:—In this case the Magistrate of Cochin, a Justice of the Peace, has convicted and sentenced a merchant seaman, who is a European British subject, for the offence of wilful disobedience to orders under Clause 4, Sec. 83 of Act I of 1859. All offences under the Act made punishable by any penalty may be prosecuted summarily before a Magistrate or any person exercising the powers of a Magistrate (Sec. 112). By the provisions of Act XXII of 1870, the Magistrate exercising jurisdiction over such offenders must be a Justice of the Peace. By Section 72 of the Code of Criminal Procedure (Act X of 1872) it is enacted that no Magistrate or Justice of the Peace shall have jurisdiction to enquire into a complaint or try a charge against a European British subject unless he is himself a European British subject. The Magistrate of Cochin is a Justice of the Peace, but he is not a European British subject, and the question has arisen whether he now has jurisdiction over such offenders.

(a) Holloway, J. dissented from this ruling.

1873. *December* 18.

The Magistrate clearly had this jurisdiction before the enactment of Act X of 1872. But the High Court is of opinion that the jurisdiction over European British subjects conferred by the previous law on Magistrates who were also Justices of the Peace has been changed by Section 72 of this Code. It is true that by the 2nd Section wherever a special form of procedure is prescribed by any law not thereby expressly repealed, it shall not be deemed to have been impliedly repealed by reason of its being inconsistent with the provisions of the Code. But this saving of special forms of procedure cannot operate on matters which belong not to procedure but to jurisdiction and the constitution of the tribunals, and particularly it does not touch the special qualification by law required to give Magistrates jurisdiction over European British subjects. This special qualification is not to be restricted to cases in which the proceedings are under the Code. By the old law a Magistrate who was also a Justice of the Peace had this jurisdiction. By the new law no Magistrate or Justice has it unless he is a European British subject. The jurisdiction is, therefore, taken from those who formerly possessed it and is given to a different class of persons. The old and the new laws cannot stand together, and this inconsistency works a repeal of the former. The saving in the 2nd Section does not prevent this. The Magistrate's proceedings were without jurisdiction and the conviction and sentence will be quashed.

Appellate Side.

Proceedings, 15*th June* 1874.

1874. *June* 15.

UPON the question from the Acting District Magistrate of Bellary, whether a Subordinate Magistrate (to whom a case has been referred by his Division Magistrate) can refer the same to his Sheristadar Subordinate Magistrate,

The High Court made the following

Section 44 of the Code of Criminal Procedure confers no authority on one Subordinate Magistrate to refer to another Subordinate Magistrate a case referred to him for disposal.

RULING :—In this case the Deputy Magistrate, acting under Section 44 of the Code of Criminal Procedure, referred a complaint of an offence punishable under Section 352 of the Penal Code and 24 of Act I of 1871 (Cattle Trespass Act) to the Taluq Magistrate for disposal. That officer again referred the case to his Sheristadar in his capacity of 3rd Class Magistrate, who acquitted the accused.

1874. June 15. The High Court are of opinion that the second reference to he Sheristadar 3rd Class Magistrate was illegal. Section 44 of the Code confers no authority on one Subordinate Magistrate to refer to another Subordinate Magistrate a case referred to him for disposal.

Appellate Side.

Proceedings, 30th June 1874.

1874. June 30. UPON reading a letter from the Acting District Magistrate of Salem referring, under Section 296 of the Code of Criminal Procedure, certain proceedings of the 2nd Class Magistrate of Harur as contrary to law,

The High Court made the following

An offence under Sec. 404 of the Penal Code is not one of the class of offences that may be compounded.

RULING :—In this case the Subordinate Magistrate of Harur permitted the withdrawal, under Section 188 Criminal Procedure Code, of a charge of an offence punishable under Section 404 of the Penal Code. The District Magistrate refers the order of the Subordinate Magistrate as illegal on the ground that an offence under Section 404 of the Penal Code is not one of the class of offences falling within the exception to Section 214 of the Penal Code. The High Court agree with the District Magistrate in the opinion that an offence under Section 404 of the Penal Code is not one of the class of offences that may be compounded. The dishonest intent expressed in the section is a necessary ingredient of the offence and even on the assumption that all compromises not forming grounds of punishment are now legal, the offence charged is not one in which compromise is permissible.

Appellate Side.

Proceedings, 10th August 1874.

1874. August 10. This day the High Court made the following

In all applications under Section 4 of Act XXIII of 1861 in suits brought upon a bond or other document, the place at which the document was executed must be distinctly stated.

ORDER :—The High Court observe that the disposal of applications under Section 4 of Act XXIII of 1861 in suits brought upon a bond or other document is frequently delayed by the necessity of a reference as to the place at which the bond or document sued on was executed.

To obviate this delay in future, the High Court direct that in all such applications the place at which the document was executed be distinctly stated.

Appellate Side.

Proceedings, 8th January, 1873.

1873. *January 8.*

UPON reading a letter from the Sessions Judge of Chingleput referring, under Section 434 of the old Code of Criminal Procedure, the proceedings of the Assistant Magistrate of Chingleput in case No. 68 of 1872, in which certain villagers were accused of having committed a serious riot in order to stop a procession which they disapproved of and believed had been rendered illegal as contrary to law, the High Court made the following observations.

In a case of a very serious riot, the rioters were acquitted by the Magistrate because he thought they might have considered their act justified because the procession was illegal by virtue of some orders, which did not appear, which might have been efficacious in point of law.

Held, that the thinking a thing legal which is not so, can be no defence to a man who violates a rule of law; that there was no evidence that the procession was illegal, and that, if it were, the accused were bound to invoke the aid of the tribunals charged with the enforcement of the law.

HOLLOWAY, J:—In this case there is a very serious riot. The rioters have been acquitted by the Assistant Magistrate, because he thinks that they might have thought that their act was justified because the procession was illegal by virtue of some orders, which do not appear, which may have been efficacious in point of law. In the first place, the thinking a thing legal which is not so is and can be no defence to a man who violates a rule of law. In the second, there is not a particle of evidence that it was illegal, and in the third, if it were so, the accused were bound to invoke the aid of the tribunals charged with the enforcement of the law and not to undertake by riot and affray to enforce it themselves. In *Hyde* v. *Graham*, 1 H. & C. POLLOCK, C. B., remarks the natural tendency of the law of all civilized States is to restrict within constantly narrowing limits the right of self help, and it is certain that no other principle can be safely applied to a country abounding in sects inflamed with the bitterness engendered by small theological or ceremonial differences. It must be remembered too, that the Chief Baron is here speaking of the right of self-defence as to civil wrongs. In the domain of penal law, that right can extend to no cases not expressly defined by the law itself. The fact, therefore, of the illegality of the act of the opponent of the accused is wholly indifferent, unless it brings itself within the category of those in which self defence is permitted. If therefore the act were illegal it would be no defence

1873. January 8.

whatever to the accused. Here, however, there is no pretence that the rioters were defending themselves against any thing but a shock to their prejudices, and the right of self help clearly did not come at all in question. If the act was a wrong the right of remedying it was not in them. Anything more dangerous than the doctrine of the Assistant Magistrate can hardly be imagined. A steady application of it would speedily deluge the country with blood. The order of acquittal must be reversed as bad in law and a new trial held before the District Magistrate.

INNES, J. :—The assembly was unlawful because its object was to enforce a supposed right by a show of criminal force. In pursuance of the common object, force was used, and a serious riot took place. The order should be reversed and a new trial held.

Appellate Side.

Proceedings, 6th November 1874.

1874. *November* 6.

UPON reading a letter from the Acting Judge of the Court of Small Causes at Madura, referring certain questions regarding the admissibility in evidence of a certain document for the decision of the High Court.

The High Court made the following

A bond written partly on one and partly on another stamp paper, the two aggregating the proper stamp leviable, was tendered in evidence without the certificate required by Section 49 of the General Stamp Act.

Held, that there was a deficiency in the stamp on the bond and therefore a liability to the penalty. That the deficiency must be held to be equivalent to the difference between the value of the stamp on one of the papers and the whole value chargeable.

RULING :—In the case submitted a bond written partly on one and partly on another stamp paper—the two aggregating the proper stamp leviable—was tendered in evidence without the certificate from the Collector or stamp vendor as required by Section 49 of the General Stamp Act.

The Judge of the Small Cause Court, having decided that the bond was admissible in evidence and that no penalty was leviable thereon under Section 20 of the Act, requests a ruling of the High Court as to the correctness of his decision.

The High Court are of opinion that there was a deficiency in the stamp on the bond and therefore a liability to the penalty.

The deficiency must be held to be equivalent to the difference between the value of the stamp on one of the papers and

the whole value chargeable. In the case stated the effect of Section 50 was to require that the stamp on one of the papers should be of the full value. Each of the two papers used without the ground of excuse was therefore deficient by one half of the sum leviable. 1874. *November* 6.

The bond should therefore have been admitted in evidence after payment of the penalties prescribed by Section 20 and not otherwise.

Appellate Side.

Proceedings, 11th November 1874.

UPON reading a letter, dated the 12th August 1874, from the Acting Sessions Judge of Madura, the High Court made the following 1874. *November* 11.

RULING:—In the above letter the Sessions Judge, referring to certain instructions issued by him to the Magistracy in his Court's Proceedings, dated 24th June 1874, requests a ruling of the High Court on the question whether private Vakils can be admitted to defend parties in criminal trials before the Magistracy.

The practice of admitting private Vakils to defend parties in Criminal Courts is not illegal. It is discretionary with the Magistrate to hear such agents or not.

The High Court are of opinion that the practice of admitting private Vakils to defend parties in Criminal Courts is not illegal. Section 186 of the Criminal Procedure Code leaves it to the discretion of the Magistrate to hear such agents or not.

Appellate Side.

Proceedings, 11th November 1874.

UPON reading certain letters from the Sessions Judge of Coimbatore referring, under Section 296 of the Code of Criminal Procedure, the Proceedings of the Joint Magistrate in maintenance Cases Nos. 3, 5 and 6 of 1870, as contrary to law. 1874. *November* 11.

The High Court made the following

RULING:—In these cases the Joint Magistrate refused, on the ground that the amendment in para. 3 of Section 536 of the Criminal Procedure Code rendered the legality of the procedure doubtful, to levy accumulated arrears of maintenance allowance by a single warrant.

There is nothing in the amended Section of the present Code of Criminal Procedure (Section 536 of Act X of 1872) to render the levy of accumulated arrears of maintenance by a single warrant illegal.

1874. *November* 11.

The High Court in their Proceedings, dated 19th April 1871, ruled with reference to Section 316 of the late Criminal Procedure Code (Act XXV of 1861) that the levy of accumulated arrears of maintenance by a single warrant was not illegal, and they can see nothing in the amended section of the present Code (Section 536 of Act X of 1872) to lead them to doubt the applicability of that decision to the existing law. The only difference between the old and new Sections (Section 316 of Act XXV of 1861 and Section 536 of Act X of 1872) is that under the former the Magistrate could only do one of two things, viz., levy the amount due or order the defaulter to be imprisoned for a period not exceeding one month. Under the latter he may do both, viz., levy the amount due and order the defaulter to be imprisoned for a term not exceeding one month for each month's allowance remaining unpaid. The words "not exceeding one month for each month's allowance remaining unpaid" seem to contemplate the very case of arrears of more than one month. Were it otherwise the scale would be unnecessary. The order must be set aside and the Joint Magistrate directed to give effect to the interpretation of the law now laid down.

Appellate Side.

Proceedings, 12th November 1874.

1874. *November* 12.

UPON reading several letters from the Acting Sessions Judge of Coimbatore, referring the Proceedings of the Northern Division Deputy Magistrate in certain cases as contrary to law,

The High Court made the following

Defendants were convicted of committing mischief under the following circumstances. During certain seasons of the year they received water through a certain sluice for the irrigation of their lands. At another season the sluice was closed and the water allowed to flow to the lands of other cultivators. This arrangement was prescribed by the Revenue Authorities, and the defendants violated it by opening their sluice during the season prescribed for the irrigation of the lands of the other cultivators. *Held*, by the High Court, that the conviction could not be sustained. That there had been no destruction of property, or diminution in the value or utility of property by defendants within the definition in Section 425 of the Penal Code.

RULING:—In these cases the defendants were convicted under Section 430 of the Penal Code of committing mischief by diminishing the supply of water for agricultural purposes and were sentenced to pay fines of varying amounts commutable in default to short terms of rigorous imprisonment.

The facts are stated as follows:—

During certain seasons of the year the defendants receive water through a certain sluice for the irrigation of their lands. At another season the sluice leading to defendants' lands is sealed up and the water of the channel is allowed to flow to the lands of other cultivators. This arrangement for the distribution of the water is prescribed by the Revenue Authorities, and defendants, having acted in violation of the arrangement and opened the sluice during the season prescribed for the irrigation of the lands of the other cultivators, have been convicted of mischief under Section 430 of the Penal Code.

The High Court are of opinion that the conviction under Section 430 of the Penal Code cannot be sustained. There has been no destruction of property or diminution in the value or utility of property by defendants within the definition in Section 425 of the Penal Code.

The destruction or diminution in the value of crops or lands of others may be a probable result of the defendants' act, but it is not the act itself.

The conviction must be quashed, and the fines, if levied, refunded.

Appellate Side.

Proceedings, 23rd November 1874.

1874. *November* 23.

UPON reading a letter from the Sessions Judge of South Arcot, referring the commitment by the Acting Joint Magistrate of South Arcot in Session Case No. 92 of 1874, as contrary to law,

The High Court made the following

A Magistrate, after examining four witnesses for the prosecution, discharged the accused under Section 195, Chapter XV of the Criminal Procedure Code. Subsequently, on becoming aware that there was a fifth witness present, the Magistrate cancelled his order of discharge, took further evidence, and committed the accused for trial to the Court of Session. *Held*, that the commitment was good.

RULING:—In this case the Joint Magistrate, after examining four witnesses for the prosecution, discharged the accused under Section 195, Chapter XV of the Criminal Procedure Code.

Subsequently on becoming aware that there was a fifth witness present, the Joint Magistrate cancelled his order of discharge, took further evidence and committed the accused for trial to the Court of Session.

Objection having been taken before the Sessions Court to the commitment, the Session Judge submits the case for the orders of the High Court with reference to explanation 1, Section 197 of the Criminal Procedure Code.

The High Court observe that in the crucial case of a commitment by a Magistrate without jurisdiction, the commitment is not to be quashed unless the accused has been prejudiced. In the present case there is no question as to the jurisdiction of the Magistrate to commit and there is nothing to show that the accused has been prejudiced. The commitment will therefore stand good.

Appellate Side.

Proceedings, 23rd November 1874.

1874. *November* 23.

UPON reading a letter from the Magistrate of Bellary,

The High Court made the following

RULING:—In the letter above recorded the District Magis-

1874. *November* 23.

No Advocate or Attorney of the High Court, or authorised Pleader, appearing in defence of an accused person, under Section 186 of the Criminal Procedure Code should be required to file a vakalatnamah.

trate inquires whether an Advocate or Attorney of the High Court, or authorised pleader, appearing in defence of an accused person, under Section 186 of the Criminal Procedure Code, is required to file a vakalatnamah.

The High Court are of opinion that no vakalatnamah is in such case requisite.

Appellate Side.

Proceedings, 28th October 1874.

1874. *October* 28.

UPON reading a letter from the Sessions Judge of South Malabar, referring certain Proceedings of the Acting Head Assistant Magistrate of Malabar in Case No. 29 of 1874, as contrary to law,

The High Court made the following

Defendant, being detained in custody for the purpose of giving security for good behaviour, escaped from that custody. *Held*, that he had not committed an offence under Section 224 of the Penal Code.

RULING :—In this case the defendant escaped from the custody in which he was detained for the purpose of giving security for good behaviour under Section 505 (*a*) of the Criminal Procedure Code.

For this escape defendant was tried and convicted of an offence punishable under Section 224 of the Penal Code.

The High Court are of opinion that the conviction under Section 224 (*b*) of the Penal Code is illegal.

(*a*) Section 505 of the Criminal Procedure Code is as follows :—"Whenever it appears to such Magistrate, from the evidence as to general character adduced before him, that any person is by repute a robber, house-breaker or thief, or a receiver of stolen property, knowing the same to have been stolen, or of notoriously bad livelihood, or is a dangerous character, such Magistrate may require similar security (*to that in Section* 504) for the good behaviour of such person for a period not exceeding one year."

(*b*) Section 224 of the Indian Penal Code is as follows :—"Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.—*Explanation.*—The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted."

1874. *October* 23. The defendant was lawfully detained in custody, but not for an offence.

The conviction and sentence must be quashed.

Appellate Side.

Proceedings, 6th November 1874.

1874. *November* 6. UPON reading a letter from the Acting Sessions Judge of the Madura Division,

The High Court made the following

In criminal cases a complainant cannot claim, as of right, to be heard as a respondent in appeal. The matter is, in each case, in the discretion of the Court.

RULING :—In the above letter the Sessions Judge refers for the decision of the High Court the question whether, under Sections 279(*a*) and 280(*b*) of the Criminal Procedure Code, a complainant can be heard as a respondent in the Appellate Court.

The High Court are of opinion that a complainant cannot claim as of right to be heard in appeal. The matter is one which may be left in each case to the discretion of the Court.

(*a*) Section 279:—"If the Appellate Court decide to hear the appeal, it shall cause notice to be given to the appellant, and, if the appeal be to the Session or High Court, shall also give notice to the Magistrate of the District, who shall inform, if necessary, the Public Prosecutor, Government Pleader, or other officer empowered in that behalf, of the day on which such appeal will be heard?"

(*b*) Section 280 :—"The Appellate Court, after perusing the Proceedings of the Lower Court, and after hearing the appellant, his Counsel or Agent, if they appear, and the Public Prosecutor, Government Pleader or other officer empowered by Government or by the Magistrate of the District in that behalf, if he appears, may alter or reverse the finding and sentence, or order of such Court, and may, if it see reason to do so, enhance any punishment that has been awarded.

Provided that if the appeal is from the sentence of a Magistrate of any class, the Appellate Court shall not inflict a greater punishment than might have been inflicted by a Magistrate of the 1st Class."

Appellate Side.

Proceedings, 30th November 1874.

UPON reading a letter from the Acting Sessions Judge of Madura referring the Proceedings of the Joint Magistrate in Miscellaneous Proceeding No. 6 of 1874, as contrary to law, 1874. *November.* 30.

The High Court made the following

Where defendant was summoned to appear before a Magistrate on a certain date, but the summons did not specify the place of appearance. *Held*, that the Magistrate ought not to have passed an *ex parte* order in defendant's absence, as there was no failure to appear because no place was specified at which the petitioner was to appear.

RULING :—In this case the Defendant in a Magisterial Proceeding under Chapter XLI (*a*) of the Criminal Procedure Code was summoned to appear before the Magistrate on a certain date. Defendant having failed to appear on the date fixed, the Magistrate disposed of the case *ex parte*.

Application was subsequently made to the Magistrate to cancel the *ex parte* order on the ground, among others, that the summons did not specify the place of appearance.

The Magistrate was of opinion that he had no power to set aside his own *ex parte* order,and that Petitioner's objection regarding the non-insertion in the summons of the place of appearance was futile, inasmuch as the form of summons prescribed by authority is silent as to the place of attendance.

The High Court are of opinion that the objection urged by the Petitioner was a valid one and should have been allowed. There was no failure to appear, because no place was specified at which Petitioner was to appear.

The *ex parte* order must be set aside. The Joint Magistrate will proceed to hear and dispose of the case in the proper manner.

Appellate Side.

Proceedings, 5th January 1875.

UPON reading a letter from the Magistrate of Bellary, referring, at the instance of the Head Assistant Magistrate, the Proceedings of the 3rd Class Magistrate of the Taluk of Madaksirah in case No. 240 of 1874, as contrary to law, 1875. *January* 5.

(*a*) Chapter XLI—" Of the maintenance of wives and families."

1875.
January 5.

The High Court made the following

Ruling :—The defendant in this case was convicted and punished for disobeying an order of a public servant requiring his attendance at a certain time and place, an offence punishable under Section 174 of the Penal Code.

Complainant, a batta peon, arrested defendant on a warrant and asked him to follow him. Defendant promised to do so, went into his house on the pretext of fetching a turban and absconded. *Held* that a conviction under Section 174 of the Penal Code was illegal.

The circumstances are that complainant, a Batta Peon on the establishment of a District Munsif's Court, was entrusted with a warrant for the arrest of the defendant, who had failed to pay the amount of his judgment debt. Complainant found the defendant in his village, and, after shewing his warrant, he asked the defendant to follow him, defendant promised to do so, went into his house on the pretext of fetching a turban and absconded.

The High Court are of opinion that the conviction is illegal. The escape, if there was one, was not an offence punishable under Section 174 of the Penal Code.

The conviction must be set aside and the fine, if levied, refunded.